90-1013

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STEPHEN C. STEM,

Petitioner,

V.

RALPH AHEARN AND CHRIS CARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November, 1990

QUESTIONS PRESENTED

1. Whether Petitioner's claim for injunctive relief is barred by the Eleventh Amendment.

2. Whether individuals employed as field workers for a county childrens protective agency are entitled to a good faith exemption under the Eleventh Amendment.

LIST OF OTHER PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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Petitioner,

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RALPH AHEARN AND CHRIS CARD,

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_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

John K. Grubb, on behalf of STEPHEN C. STEM, petitions for a Writ of Certiorari to

review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

There was no formal opinion of the District Court. The District Court's orders are reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, pp. 1a-8a), was entered on August 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides in relevant part:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

3. 28 U.S.C. § 1254(1) provides:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioner, STEPHEN C. STEM, filed a complaint against RALPH AHEARN

(hereinafter "AHEARN"), CHRIS CARD (hereinafter "CARD"), HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICE (hereinafter "HCCPS"), and HARRIS COUNTY, in the United States District Court for the Southern District of Texas, Houston Division, on August 15, 1988. The complaint alleged that Appellants acted in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1985, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Attorney General of Texas answered the civil complaint on behalf of all the named Defendants.

Petitioner, STEPHEN C. STEM'S Complaint arose from Respondents, RALPH AHEARN'S and CHRIS CARD'S negligence in the investigation and handling of a sexual abuse complaint.

Prior to Respondents getting involved in the case, Petitioner and his estranged wife had agreed informally to share custody of

their two minor children. Subsequently, the wife believed Petitioner sexually abused their minor daughter after the child was returned to the wife from a weekend visit with Petitioner. The wife never informed Petitioner of the sexual abuse allegation. The wife took the child to the hospital for a number of examinations. The examinations resulted in no medical evidence of any sexual abuse. In accordance with standard procedure, the examining physician notified HCCPS of the alleged sexual abuse.

Respondent, AHEARN, is the child protective service worker who was assigned to the case. Respondent, CARD, was AHEARN'S supervisor. Respondent, AHEARN, never interviewed Petitioner or notified him of the investigation.

On August 28, 1986, Respondent, AHEARN, met with Petitioner's wife and the minor child. They were taken into a room at the HCCPS offices where they met with Respondent, AHEARN, for approximately one hour. Then Respondent, AHEARN, took the child into a room by herself to videotape her, but the child would not recite the story about the alleged abuse. Respondent, AHEARN, then got the child's mother to come into the video room. Throughout the entire video, the child's mother remained present and encouraged the child several times. Several statements made in the videotape are inconsistent with purported statements made to Respondent, AHEARN, in an unrecorded telephone conversation with the child.

On August 27, 1986, Petitioner's wife had her attorney file a request that she be appointed Sole Managing Conservator of the

children. The request was filed with the Court after the doctor had examined the child and found no physical evidence of sexual abuse. This Motion was filed prior to the meeting between Petitioner's wife and Respondent, AHEARN.

A hearing was set in the Family Court by the attorney for Petitioner's wife to be heard on September 9, 1986. From the time the Motion was filed until the hearing date, Petitioner was not permitted to see or have any contact with his children and was given no explanation for this deprivation. On the hearing date was the first time Petitioner or his attorney learned of the sexual abuse allegations against Petitioner. The hearing was postponed and reset. The hearing was rescheduled for January 16, 1987. From August 27, 1986 through January 16, 1987,

Petitioner had virtually no contact or visitation with his children.

As a result of Respondent, AHEARN'S unfounded finding that Petitioner abused his child, Petitioner lost the Joint Managing Conservatorship agreement he had with his wife. Also as a direct result of the sexual abuse allegations of Respondent, AHEARN, Petitioner's wife was appointed the Managing Conservator of the children and was given all of the rights of a parent to the exclusion of Petitioner, except for limited visitation.

Each Defendant filed a Motion for Summary Judgment. The District Court ruled that HCCPS is an organizational arm of the Texas Department of Human Services (hereinafter ("TDHS") and that such a state agency enjoys Eleventh Amendment immunity. The District Judge further ruled that Harris County cannot be held vicariously liable for the actions of

state agencies as charged in the Complaint. The Judge granted HCCPS and TDHS' Motion for Summary Judgment.

The District Court declined to grant Summary Judgment in favor of AHEARN or CARD, reasoning that neither enjoys Eleventh Amendment immunity or qualified immunity.

The Defendants, AHEARN and CARD, filed an interlocutory appeal with the United States Court of Appeals, Fifth Circuit. The Appeal was limited to the issue of immunity, if any, available to child protective service workers, in their official and individual capacities.

The United States Court of Appeals, Fifth Circuit, granted Summary Judgment in favor of AHEARN and CARD. The Fifth Circuit found that the individual Defendants, AHEARN and CARD, had official and qualified immunity.

REASONS FOR GRANTING THE PETITION

I.

The threshold issue is whether Petitioner's suit for injunctive relief is barred by the Eleventh Amendment. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. Amend. XI.

This Amendment does not expressly prohibit suits in federal court against a state by its own citizens, but it has long been interpreted to bar such suits. Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).

In this case, Petitioner sought injunctive relief under 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . .

42. U.S.C. § 1983.

Petitioner's complaint stated a number of viable claims under 42 U.S.C. § 1983. Respondents clearly violated Petitioner's constitutional and statutory rights. These rights were violated by two non-policy making lower-level employees, therefore making Petitioner's only remedy a suit against Respondents AHEARN and CARD, individually under a § 1983 action.

In the case at bar, Respondents clearly violated Petitioner's statutory rights by totally disregarding Harris County Children's Protective Services own guidelines which were specifically designed by the State and Harris County to protect a parent while a complaint is being investigated by the childrens protective service workers.

Furthermore, Respondent's violated Petitioner's fundamental rights guaranteed to a person by the United States Constitution, including the right of life, liberty, and the pursuit of happiness. These fundamental constitutional rights were violated when Respondents deprived Petitioner of the right to be a parent to his children. Respondents knew or should have known that Petitioner was entitled to

due process prior to violating his constitutional rights.

Respondents violated Petitioner's fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted intrusions by the state. The Courts are required to carefully scrutinize any attempt to intrude upon these rights. Moore v. Sims, 442 U.S. 415, 99 S. Ct. 2371 (1979).

Respondents violated Petitioner's due process rights by failing to contact Petitioner to notify him that a sexual abuse complaint had been filed against him. Petitioner was never interviewed by Respondents, nor were the sexual abuse allegations verified or documented by photographs, witnesses, medical statements, or statements from any professional person. Furthermore, Respondents never notified

Petitioner of the results of the investigation. Petitioner was not made aware that there was a complaint or any type of investigation had occurred until Petitioner appeared for a hearing in the Family Courts several months later. At that point, the investigation had already been completed, leaving Petitioner no chance to defend himself, attend the videotape sessions, or to confront the witnesses.

Due process requires a fair and impartial trial before a competent tribunal which includes an opportunity to be heard, and reasonable opportunity to prepare for the hearing. To prepare for a hearing, an individual must have reasonable notice of the claim or charge against him so as to advise him of the nature thereof, and the relief sought. In the Interest of B

M N , 570 S.W. 2d 493 (Tex. App. - Texarkana 1978, no writ).

Based upon the above-referenced facts, it is clear that Respondents' contention that Petitioner failed to state a claim under 42 U.S.C. § 1983 is not true.

The case law is undisputed that actions seeking injunctive relief under 42 U.S.C. § 1983, consistent with the Eleventh Amendment, are permissible in federal court even if they require the state to expend some public funds in implementing relief and thus even if the award has an ancillary effect on the state treasury. Edelman v. Jordan, 415 U.S. 651, 677, 94 S. Ct. 1347, 1362, 39 L. Ed. 2d 662 (1973); Jackson Sawmill Co. v. United States, 580 F.2d 302, 309 (8th Cir. 1978), cert. denied, 439 U.S. 1070, 99 S. Ct. 839 59 L. Ed. 2d 35 (1979).

In Petitioner's complaint, he requests injunctive relief. Therefore, his claim for injunctive relief under 42 U.S.C. § 1983 should not be denied.

Petitioner has also alleged that his liberty interest which are protected under the due process clauses of the Fifth and Fourteenth Amendments were denied by Respondents during their investigation.

A complaint should not be dismissed or denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 246, 100 S. Ct. 502, 511, 62 L. Ed. 2d 441 (1980); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

In the case at bar, Petitioner has shown enough evidence to prove a number of facts that would support his claim that he is entitled to injunctive relief.

The law clearly states that the Eleventh Amendment is no bar to a suit against state officials to restrain unconstitutional acts undertaken in their official capacities. The law recognizes the right of an interested party to force state officials to act in accordance with the Constitution. Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974); U.S.C.A. Const. Amend. 11.

The Eleventh Amendment's immunity is unavailable to state officials where an action of constitutional proportions is brought for injunctive relief. Id. at 706; Georgia R. R. and Banking Co. v. Redwine,

342 U.S. 299, 72, S. Ct. 321, 96 L. Ed. 335 (1952).

II.

Whether individuals employed as field workers for a county childrens protective agency are entitled to a good faith exemption under the Eleventh Amendment.

Petitioner named Respondents STEM and AHEARN, individually, in his complaint because each of them personally violated the Constitution and Petitioner's constitutionally protected rights of life, liberty, and the pursuit of happiness. Because of this deprivation of his rights, Petitioner sued for injunctive relief.

Personal action by Respondents individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is

required is that the official be responsible for the challenged action.

This exception to the Eleventh Amendment is stated in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). As the Young court held, it is sufficient that the state officer sued must, "by virtue of his office, have some connection" with the unconstitutional act or conduct complained of. "Whether this connection arises out of general law, or is specially created by the act itself, is not material so long as it exists". Young, 209 U.S. 157, 28 S. Ct. at 453,; Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).

Respondents, AHEARN and CARD, did not act in good faith in their handling of the complaint alleged against Petitioner. In this case, Respondents were grossly negligent in the investigation of the

complaint therefore not entitling Respondents to any good-faith exception to the Eleventh Amendment.

Petitioner is permitted by law to seek injunctive relief under the exception to the Eleventh Amendment. The Eleventh Amendment is no bar to suit against state officials to restrain unconstitutional acts undertaken in their official capacities. The law recognizes the right of an interested party to force state officials to act in accordance with the Constitution. Jordan v. Gilligan, 500 F.2d 701 (1974).

The scope of the exception to the Eleventh Amendment focuses not on the source or amount of funds required to be expended if relief were granted, but on whether the funds were required to be expended as compensation for past wrongdoing by the state or as an "ancillary effect" of

compliance with the court order. As the Supreme Court explained in Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974),

> State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young.

Id. at 668, 94 S. Ct. at 1358. See also, Milliken v. Bradley, 433 U.S. at 289, 97 S. Ct. at 2461 (Eleventh Amendment no bar to court order that state defendants pay one-half costs attributable to education components in school desegregation plan; the Young exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law,

notwithstanding a direct and substantial impact on the state treasury").

The key to determining the difference between the type of relief barred by the Eleventh Amendment and that permitted under the exception is a narrow one. The key, however, is whether an expenditure is a "necessary result of compliance with decrees which by their terms are prospective in nature, or a goal in itself". Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

When this test is applied to the relief Petitioner seeks, it is clear that the Eleventh Amendment does not bar this suit. Petitioner seeks an order to compel Respondents to conduct their investigations in a manner that meets minimum constitutional standards. While the state may ultimately finance compliance with such

an order, this fact is not determinative. Any funds that the State of Texas may be required to spend would be an ancillary effect on future compliance with constitutional standards. The relief sought by Petitioner in this case falls within the Ex parte Young exception to the Eleventh Amendment's general prohibition of suits brought against a state by its own citizens.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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November, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2641

Stephen C. Stem,

Plaintiff-Appellant,

versus

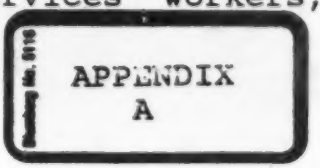
Ralph Ahearn and Chris Card,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston Division; Lynn H. Hughes, Judge. (CA)

Argued:
Decided: August 13, 1990

Father who was target of child molestation investigation brought action asserting constitutional claims against child protective services workers, investigating



agency and county. The United States District Court for the Southern District of Texas, Lynn H. Hughes, J., granted partial summary judgment in favor of agency and county, and workers appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that workers enjoyed immunity from liability in both their official and personal capacities.

Reversed and remanded.

Court of Appeals may entertain appeals although seemingly interlocutory in nature, prosecuted by public officials who seek to challenge district court's determination that they do not enjoy either absolute or qualified immunity from suit; however, district court's denial of motion for summary judgment because of perceived lack of qualified or absolute immunity constitutes appealable "final decision" only if immunity

defense turns upon issue of law and not of fact.

See publication Words and Phrases for other judicial constructions and definitions.

Eleventh Amendment generally divests federal courts of jurisdiction to entertain citizen suits directed against states. U.S. C.A. Const. Amend. 11.

Eleventh Amendment is not evaded when citizen sues state employees in their official capacity, since such indirect pleading device remains in essence a claim upon state treasury. U.S.C.A. Const.Amend. 11.

States may voluntarily waive Eleventh Amendment protection, if unequivocally expressed, or Congress may forcibly pierce state sovereign immunity. U.S.C.A. Const. Amend. 11.

State's political subdivisions, such as counties and municipalities, do not fall within protection of Eleventh Amendment. U.S.C.A. Const.Amend. 11.

In determining whether entity is organ of state or county government for Eleventh Amendment immunity purposes, court examines: whether state law views entity as arm of state; source of entity's funding; degree of local autonomy retained; whether entity is concerned primarily with local, as opposed to statewide problems; whether entity has authority to sue and be sued in its own name; and whether entity retains right to hold and use property. U.S.C.A. Const. Amend. 11.

Child protective services employees were state, rather than county, employees for Eleventh Amendment immunity purposes, and, thus, were immune from suit in their official capacities. U.S.C.A. Const.Amend. 11.

Child protective services workers were entitled to qualified immunity in action against them in their personal capacities by father who was target of child molestation investigation; father failed to show that workers breached clearly established statutory or constitutional rights of which reasonable person would have known.

Child protective services employee's offering judicial testimony adverse to father at child custody hearing did not implicate due process concerns and, further, it constituted witness testimony that was absolutely immune form § 1983 liability. U.S.C.A. Const.Amend 14; 42 U.S.C.A. § 1983.

Due process did not require parents to be informed of pending Texas Department of Human Services investigation regarding child abuse or to be heard by Department investigators. U.S.C.A. Const.Amend. 14.

Because Texas Department of Human Services was engaged in purely fact-finding activities, it was not bound by Sixth Amendment confrontational restraints and, thus, father accused of child molestation did not have right to confront his accusers before Department investigators. U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, SMITH, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This civil rights action follows an acrimonious child-custody dispute, with one parent leveling charges of child molestation against her former husband. Child protective

services workers investigated and concluded, despite medical evidence to the contrary, that the father had sexually abused his minor daughter. As a consequence of this investigation, the mother secured a temporary state court order certifying herself as the exclusive conservator of the child.

Enjoined by court-ordered visitation, the father was denied access to his daughter for over four months. He asserts constitutional claims against the child protective services workers, the investigating agency, and the county. Among other charges, the father maintains that his fundamental parental rights were terminated without due process of law, and independently, that the investigation of the alleged molestation was orchestrated negligently and impinged upon various constitutional guarantees.

The district court granted partial summary judgment in favor of the agency and county. The court declined to grant summary judgment in favor of the individual defendants, however, concluding that they are not immune from suit in either their individual or official capacities. This appeal follows that adverse immunity determination. Concluding that the child protective services workers enjoy immunity from liability, in both their official and personal capacities, we reverse.

I.

Stephen Stem agreed informally with his estanged wife, Lee Anne, to share custody of their two minor children pending a final decree of divorce. However, before a state court had the occasion to adjudicate custodial rights, the wife accused Stem, after the child's return from a weekend

visit, of sexually abusing the minor daughter. Lee Anne did not confront her husband immediately about the child's well-being, electing instead to take her to the hospital for a physical examination. That examination evinced no medical evidence of molestation. The examining physician, however, dutifully notified the Harris County Children's Protective Services (HCCPS) of the alleged sexual abuse.

Ralph Ahearn is the child protective services employee charged with the investigation of this case. After interviewing the wife and child, Ahearn concluded, based upon his professional experience, that Stem had indeed molested his daughter , despite the lack of medical corroboration. Ahearn, however, never interviewed Stem or notified him of his investigation. Stem first learned of HCCPS's

investigation when the agency petitioned to secure a temporary state court order to confer exclusive possessory conservatorship of the child upon his wife.

Stem argues that the investigation of the charge of child molestation, raised by his estranged wife, was so grossly negligent that it served to terminate fundamental parental rights in contravention of the process minimally due under the Constitution. Specifically, he was never given notice of the investigation or given an opportunity to be heard on the sexual-abuse charges prior to his condemnation, before HCCPS, of being a molester. Presumably, an interview would have cured any suspicion harbored by HCCPS investigators.

Relying upon alleged breaches of the fifth, sixth, and fourteenth amendments, Stem seeks $7 million in actual and punitive

damages under 47 U.S.C. § 1983 against Harris County, HCCPS, Ahearn, and his supervisor, Chris Card, both of whom are sued in their official and private capacities. The Attorney General of Texas answered the civil complaint on behalf of all named defendants.

On motion for summary judgment, the district court agreed with the Attorney General that HCCPS is an organizational arm of the Texas Department of Human Services (TDHS) and that such a state agency enjoys eleventh amendment immunity. Further, Harris County, like all instruments of county government, cannot be held vicariously liable for the actions of state agencies, as essentially charged in the complaint.

However, the district court declined to grant summary judgment in favor of Ahearn or Card, reasoning that neither enjoys eleventh amendment or qualified immunity. This

interlocutory appeal is thus limited to the immunity, if any, available to these child protective services workers, in their official and individual capacities.

II.

A.

[1] We may entertain appeals, although seemingly interlocutory in nature, prosecuted by public officials who seek to challenge the district court's determination that they do not enjoy either absolute or qualified immunity from suit.[1] However, the

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[1] See, Mitchell v. Forsyth, 472 U.S. 511, 524-30, 105 S.Ct. 2806, 2814-18, 86 L.Ed.2d 411 (1985) (denial of qualified immunity is immediately appealable as a final order under 28 U.S.C. § 1291); Nixon v. Fizgerald, 457 U.S. 731, 742-43, 102 S.Ct. 2690, 2697-98, 73 L.Ed.2d 349 (1982) (denial of absolute immunity immediately appealable); Nieto v. San Perlita Ind. School Dist., 894 F.2d 174, 176-77 (5th Cir. 1990) (court has jurisdiction under Mitchell to review the district court's denial of summary judgment

district court's denial of a motion for summary judgment because of the perceived lack of qualified or absolute immunity constitutes an appealable "final decision" only if, as here, the immunity defense turns upon an issue of law and not of fact.[2]

B.

[2, 3] The eleventh amendment generally divests federal courts of jurisdiction to entertain citizen suits directed against states. Port Authority Trans-Hudson Corp. v. Feeney, --- U.S. ---, 110 S.Ct. 1868, 1872,

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predicated upon qualified immunity); Loya v. Texas Dep't of Corrections, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam) (denial of motion to dismiss on the ground of eleventh amendment immunity is a "final decision" appealable under 28 U.S.C. § 1291).

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See, Thompson v. City of Starkville, 901 F.2d 456, 469 (5th Cir. 1990); Brawner v. City of Richardson, 855 F.2d 187, 190-91 (5th Cir. 1988).

109 L.Ed.2d 264 (1990); Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). The amendment is not evaded by suing state employees in their official capacity, since such an indirect pleading device remains in essence a claim upon the state treasury. See, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-09, 79 L.Ed.2d 67 (1984); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed 389 (1945).

[4] The state, of course, may voluntarily waive eleventh amendment protection, if unequivocally expressed, Port Authority, 110 S.Ct. at 1873, or Congress may forcibly pierce state sovereign immunity to the extent allowed, for example, by section 5 of the fourteenth amendment, Will v. Michigan Dep't of State Police. --- U.S. ---, 109

S.Ct. 2304, 2309, 105 L.E.2d 45 (189). However, it remains a settled constitutional principle that the eleventh amendment divests the federal judiciary of jurisdiction to hear citizen suits designed, ultimately, to secure monetary recovery from nonconsenting states. It is irrelevant for purposes of eleventh amendment immunity that the action is framed against the state directly or indirectly against subordinate agencies or officeholders operating in their official capacities.

Significantly, Texas has not consented to be sued in federal court by resident or nonresident citizens regarding its activities to protect the welfare of children, nor has state sovereign immunity been eviscerated by Congress with the passage of section 1983. The Will Court, in fact, held that states and state officials sued in their official capacity are not deemed "persons" subject to

suit within the meaning of section 1983. Id. 2309, 2311-12.

[5] Thus, if Ahearn and Card are deemed Texas state employees, we lack subject matter jurisdiction to adjudicate claims fashioned against them in their official capacity. If, however, they are essentially Harris County employees, eleventh amendment immunity is not implicated, since political subdivisions, such as counties and municipalities, do not fall within the amendment's protection. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-01, 99 S.Ct. 1171, 1176-77 59 L.Ed.2d 401 (1979); Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 438 (5th Cir. 1985), cert. denied, 474 U.S. 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986). Not surprisingly, the child protective services workers claim to be employees of TDHS, undisputedly an organ of

state government. See, Tex. Hum. Res. code Ann. chs. 11, 21 (Vernon 1990) (TDHS created by legislature). Predictably, Stem asserts that the defendants are strictly Harris County child protective services employees.

[6] In determining whether an entity is an organ of state or county government for eleventh amendment immunity purposes, we examine the following nonexhaustive list of factors: (1) whether state law views the entity as an arm of the state; (2) the source of the entity's funding; (3) the degree of local autonomy retained; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity retains the right to hold and use property. Clark v. Tarrant County, 798 F.2d 736, 744-45 (5th Cir. 1986); accord McDonald v. Board of

Mississippi Levee Comm'rs, 832 F.2d 901, 906 (5th cir. 1987). The Clark factors are not designed to be applied mathematically but, when viewed in combination, aid considerably in resolving the immunity enjoyed by both the entity and its employees.

[7] With little difficulty, we conclude that Ahearn and Card are state, not county, child protective services employees. This conclusion is consistent with the view of Texas courts, which regard child protective services workers as instruments of state power, and thus, state employees for immunity purposes. See. e.g., Russell v. Texas Dep't of Human Resources, 746 S.W.2d 510, 513-14 (Tex. App. - Texarkana 1988, writ denied) (child protective services workers treated as state employees); Austin v. Hale, 711 S.W.2d

64, 66-67 (Tex. App. - Waco 1986, no writ) (same).

Functionally HCCPS, and thus Ahearn and Card, are governed by the TDHS commissioner, the administrator of a state agency. See, e.g., Tex. Hum Res. Code Ann. §§ 21.004, 21.005 (Vernon 1990). Further, the defendants were hired and trained by the state, and they remain, as Stem admits, subject to TDHS regulations. They are paid exclusively by the state and can be terminated by it.

Ahearn and Card derive their authority to investigate cases of child abuse from Texas statutory law, which is designed to address an alarming state wide problem of maltreatment of children. See, Tex. Fam. Code Ann. §§ 34.05, 34.052, 34.053 (Vernon Supp. 1990) (authorizing TDHS to investigate reports of child abuse). Significantly, any

civil judgment rendered against the workers, for injuries caused as a consequence of their official duties, necessarily would be satisfied by state funds. When viewed in combination, we conclude that the Clark factors weigh heavily in favor of state, not county, employment for the individual defendants here.

We recognize that Harris County provides HCCPS with physical facilities as well as limited funding and administrative support. Nevertheless, we are not persuaded that such limited support, coupled with the attachment of "Harris County" to HCCPS, carries particular significance for immunity purposes. Organizationally, HCCPS constitutes one of many geographically identifiable departments of TDHS. Accordingly, we grant summary judgment in

favor of Ahearn and Card in their official capacities.

C.

Where the power of government is abused by officeholders, and sovereign immunity stands in the way, monetary recovery from the responsible individuals serves as an important mechanism to vindicate constitutional guarantees. See, Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2984, 2910, 57 L.Ed.2d 859 (1978). However, these same public officeholders are due a measure of protection from "insubstantial lawsuits" and the effects of ruinous litigation. See, id. at 506-08, 98 S.Ct. at 2910-12. Qualified immunity thus serves as an accommodation to competing public policy interests, which are designed to secured both a government that is accountable and one that can function. See, Anderson v. Creighton,

483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

[8] To hold the child protective services workers personally liable here, Stem must pierce the qualified immunity that they inherently enjoy by demonstrating that the workers breached "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). That is, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640, 107 S.Ct. at 3039. Further, the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken. Harlow, 457 U.S. at 818,

102 S.Ct. at 2738; Anderson, 483 U.S. at 639, 107 S.Ct. at 3038. For purposes of summary judgment, courts are not at liberty to view the applicable law with the advantage of hindsight. See, Harlow, 457 U.S. at 818, 102 S.Ct. at 2738.

We have recently encountered a case factually similar to the instant dispute. In Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988), aggrieved parents brought a section 1983 action against Texas child protective services workers who temporarily removed the plaintiffs' children from the family home without a court order. We held that child protective services workers are entitled to, minimally, qualified immunity to ensure that an effective child-abuse investigation system exists. Id. at 1216. We rejected the TDHS workers' claim of entitlement to absolute immunity, however, for fear of immunizing

intentional violations of clearly established law. See, id. at 1212-13.[3]

To survive a motion for summary judgment against a likely defense of qualified immunity, "the plaintiff's complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of

---

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We noted in Hodorowski that other circuits confer absolute immunity upon social service workers concerned with the protection and welfare of children under the rationale that their actions are analogous to those of prosecutors, or because their actions qualify as witness testimony, both of which merit absolute immunity. See, e.g., Gardner v. Parson, 874 F.2d 131, 145-46 (3d Cir. 1989); Meyers v. Contra Costa County Dep't of Soc. Servs., 812 F.2d 1154, 1156-57 (9th Cir.), cert. denied, 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984).

immunity." Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985). In this case, Stem makes various conclusory allegations to the effect that he was deprived of due process of law, equal protection under the law, the rights secured by the privileges and immunities clause of the fourteenth amendment, and, curiously, "life, liberty, and the pursuit of happiness."

The few relevant facts that Stem pleads do not implicate the constitutional guarantees at issue, and no plain violation of clearly established law, as the law existed pending this investigation, is identified. While Stem cites caselaw for the purpose of demonstrating the existence in our jurisprudence of certain fundamental parental rights, our precedent is not supportive of his bold propositions, such as the assertion that parents must be given notice by HCCPS

before a child-abuse investigation can commence. In fact, the caselaw is overwhelmingly adverse to Stem's position, which gives us pause to consider whether this suit was initiated in good faith.

Stem, for example, heavily relies upon Chalkboard, Inc. v. Brandt, 879 F.2d 668 (9th Cir. 1989), superseded, 902 F.2d 1375 (9th Cir. 1990), for the proposition that the child protective services workers here violated a clearly established due process right. However, Brandt is completely inapposite, since that case concerns an Arizona agency's summary suspension of a day-care center's operating license, admittedly a vested property interest, without a prior agency hearing. It is well settled that private property interests cannot be forcibly removed by the state without threshold procedural safeguards.

However, in this case, Stem's parental rights were not impinged until after a state court hearing and, thus, unlike the day-care center, he received all the process constitutionally due.

[9] Stem ignores the fact that his parental rights were impinged only after a judicial hearing at which he was fully heard. Ahearn and Card never physically removed Stem's child from him or otherwise altered his parental rights under the law, although Ahearn did testify in court concerning his investigatory conclusions and did advise the mother to keep the daughter away from the plaintiff. However, offering adverse judicial testimony at a child-custody hearing does not implicate due process concerns and, further, it constitutes witness testimony that is absolutely immune from section 1983 liability. See, Briscoe v.

LaHue, 460 U.S. 325, 342-47, 103 S.Ct. 1108, 1119-22, 75 L.Ed.2d 96 (1983)(police officer's judicial testimony absolutely immune from section 1983 liability).

[10, 11] Nor does due process require parents, as Stem asserts, to be informed a pending TDHS investigation regarding child abuse or be heard by TDHS investigators. The law of Texas is such that only a court, not TDHS, is empowered to adjudicate or terminate parental rights. Ahearn and Card are completely powerless to adjudicate Stem's parental rights and, thus, like police officers, do not need to abide by trial-like procedures incident to their fact-finding mission. Further, the sixth amendment does not, as Stem suggests, vest in him a right to confront his accusers before TDHS investigators, since governmental agencies that are engaged in purely fact-finding

activities are not bound by sixth amendment confrontational restraints. Hannah v. Larche, 363 U.S. 420, 449, 80 S.Ct. 1502, 1518, 4 L.Ed.2d 1307 (1960) (investigating agencies not bound by trial-like procedures).

III.

Finding the remaining arguments raised by Stem to be completely devoid of merit, we conclude as a matter of law that the individual defendants' official and qualified immunity bars the continuation of this suit against them. Accordingly, we REVERSE and REMAND this matter for further proceedings consistent herewith, including the entry of summary judgment in favor of Ahearn and Card.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Ahearn and Card's Motion to stay proceedings during the pendency of the appeal is denied.

Signed on October 30, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

The Texas Department of Human Service's Motion for Leave to File Amended Answer is granted.

Signed on August 9, 1989 at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Harris County and the Board of Harris County Children's Protective Service are dismissed.

The remaining motions for summary judgment are denied without prejudice.

Stem takes nothing by his claim under 42 U.S.C. § 1985.

The State shall produce all documents and answer interrogatories by August 4, 1989.

Signed on July 31, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-88-2813
	§	
RALPH AHEARN, ET AL,	§	
	§	
Defendants.	§	

ORDER

Harris County Children's Protective Service's motions to dismiss and for summary judgment are denied. Suzanne Berkel is allowed to appear pro hac vice.

Signed on October 18, 1988, at Houston, Texas.

Lynn N. Hughes
United States District Judge

90-1013

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STEPHEN C. STEM,
Petitioner,

V.

RALPH AHEARN AND CHRIS CARD,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1990

STEPHEN C. STEM,

Petitioner,

V.

RALPH AHEARN AND CHRIS CARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Respondents do not concur with the Petitioner's atement of the Questions Presented. Respondents would ate that the following constitutes an accurate presentation the Questions Presented by the Petitioner in this oceeding:

1. Whether the Eleventh Amendment bars Petitioner's claim for money damages against two

employees of the Texas Department of Human Services for actions taken in their official capacities.

2. Whether two employees of the Texas Department of Human Services are entitled to qualified immunity in a suit against them in their individual capacities under 42 U.S.C.A. section 1983.

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STATEMENT OF THE CASE

Petitioner filed suit in the United States District Court for the Southern District of Texas against Respondents, Ralph Ahearn (hereinafter "Ahearn") and Chris Card (hereinafter "Card"). The complaint alleged that Respondents violated 42 U.S.C.A. section 1983, 42 U.S.C.A, section 1985, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The only relief sought by the Petitioner from Respondents was monetary damages. A true and correct copy of the Petitioner's complaint in the district court is attached as Appendix A to this Brief.

Respondents moved for summary judgment in their favor. Respondents asserted that they were entitled to Eleventh Amendment immunity in their official capacities and to qualified immunity in their individual capacities. A copy of the Respondents' motion is attached as Appendix B to this Brief.

The district court held that Ahearn and Card are employees of the Texas Department of Human Services, a state agency, but that Ahearn and Card in their official capacities were not entitled to Eleventh Amendment immunity. The district court further denied qualified immunity to the Respondents in their individual capacities. A copy of the complete order of the court is attached as Appendix C to this Brief.[1]

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[1]Respondent would point out that the Petitioner has attached as part of his Appendix B an edited version of this order. He has not informed the Court that he has deleted a portion of the court's ruling in attaching Appendix B to his Petition. That portion is significant because it reflects the district court's determination that Harris County Children's Protective Services is a part of the Texas Department of Human Services.

The Court of Appeals for the Fifth Circuit reversed the determination of the trial court. It ruled that the Respondents were entitled to Eleventh Amendment immunity in their official capacities and to qualified immunity in their individual capacities. It is from this ruling that the Petitioner seeks review. A copy of the Court of Appeals opinion is attached to the Petitioner's petition as Appendix A.

SUMMARY OF THE ARGUMENT

The Court should deny the Petitioner's Petition because it is unmeritorious and because Petitioner has failed to present its Petition with accuracy in violation of Rule 14(5).

Under the facts of this case the Respondents are entitled under the Eleventh Amendment to immunity as State officials from whom a monetary recovery is sought. In addition, the relief Petitioner seeks is barred because:

1) Stem cannot ask for new relief for the first time on appeal;
2) The Rooker-Feldman doctrine bars such relief;
3) The Anti-Injunction Act bars such relief; and,
4) Declaratory and injunctive relief are barred by claim preclusion.

In the second instance, Petitioner has failed to demonstrate any basis for reversing the Court of Appeals' determination that Ahearn and Card are entitled to qualified immunity. Contrary to Petitioner's claim in its Petition, Petitioner did not sue for injunctive relief in his Complaint; he sued solely for monetary relief. Similarly, Stem's analysis of the law is unsupportable and fraught with inaccuracies. In general, no authority is cited for the propositions of law upon which Petitioner relies. Such authority as is presented

is generally misrepresentative of the law. In no instance in the Courts below has Petitioner met the burdens imposed by *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) and *Elliott v. Perez*, 724 F.2d 1472 (5th Cir. 1985).

REASONS FOR DENYING THE PETITION

I.

Petitioner's Application is based on the contention that Ahearn and Card lack Eleventh Amendment immunity when sued in their official capacities because they supposedly do not work for the State of Texas. Stem alleges that Ahearn and Card work for Harris County Children's Protective Services (HCCPS) which, he claims, is not entitled to Eleventh Amendment protection. This argument fails both on the facts and the law and was not accepted by the Courts below.

Respondents are regarded as State employees under state law. See, e.g., *Russell v. Texas Dep't of Human Resources*, 746 S.W.2d 510, 513-14, (Tex. App. - Texarkana 1988, writ denied). They derive their authority from State statutory law. See, *Tex. Fam. Code Ann.* sections 34.05, 34.052, and 34.053 (Vernon Supp. 1991). They are governed by the Commissioner of the Department of Human Services, the chief administrative officer of the agency. See, e.g. *Tex. Hum. Res. Code Ann.*, sections 21.004, 21.005 (Vernon 1990). They were hired and trained by the State and remain subject to State regulations. Significantly, any judgment rendered against them would necessarily be satisfied from State funds. *Stem v. Ahearn*, 908 F.2d 1 (5th Cir. 1990). From this review it is obvious that the the Court of Appeals correctly concluded on the facts that Respondents were state, not county, employees. For this reason they are entitled to the same Eleventh Amendment immunity as the State.

There do remain additional reasons not addressed by the Court of Appeals for which this Petition should be denied. Procedurally, Petitioner's allegation that Ahearn and Card lack Eleventh Amendment immunity is not properly presented on appeal. The summary judgment evidence established that Ahearn and Card worked for the Texas Department of Human Services (TDHS) which operates Harris County Children's Protective Services (HCCPS). The district court ordered the case restyled to reflect this determination. See Appendix C. However, the court erroneously decided that the Eleventh Amendment did not protect these employees in their official capacity from a federal suit under 42 U.S.C. section 1983. (App. p. 117, l. 14-18; p. 118, l. 1-10; p. 120, l. 5-9.)

Petitioner apparently agrees with Appellants' interpretation of the Eleventh Amendment, because he does not seriously contend that this suit would be permissible if, in fact, the Respondents are State employees. Instead, he maintains that Appellants are employed by Harris County and therefore lack Eleventh Amendment protection. This is his principle basis for disputing the applicability of the Eleventh Amendment. (Petitioner's Brief at p. 11.) Petitioner, however, ignores the district court's finding that HCCPS and TDHS are the same entity. No party has taken issue with or appealed that finding. The district court's finding is final and controlling. As part of TDHS, HCCPS and its employees are entitled to Eleventh Amendment immunity.

This is not changed by the fact that Harris County contributes to the support of HCCPS. The Fifth Circuit has held that Eleventh Amendment immunity applies to State employees who work with the support of counties. In *Clark v. Tarrant County*, 709 F.2d 736, 744 (5th Cir. 1986), the provision of the physical facilities for adult probation officers by the County was held not to alter the probation officers'

status as State employees for Eleventh Amendment purposes.

Stem further alleges that he pled for injunctive relief and that the Eleventh Amendment does not apply under the *Ex Parte Young* fiction. The *Ex Parte Young* fiction states that when a State official is sued in his own name for injunctive or declaratory relief, suit is not precluded by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 454, 52 L.Ed.2d 714 (1908). Federal law bars this contention for four reasons.

First, a careful reading of the complaint shows that Petitioner's claim is false. Petitioner never requested any kind of injunctive or declaratory relief, general or otherwise. See Appendix A. Indeed, Stem never cites the location in his complaint at which he pled for such relief. Even in this proceeding Petitioner has failed to define either the rights he supposedly wants declared or the conduct he wants to have enjoined. Stem cannot ask for new relief for the first time on appeal. Any claim for relief not presented to the district court was waived. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir. 1977).

Second, Stem alleged that he was harmed when a State district court appointed him possessory conservator of his children rather than joint managing conservator. Any injunctive or declaratory relief requested by Stem must necessarily relate to this order.[2] Any declaratory or injunctive relief to which Petitioner could conceivably be entitled would be moot without a retrial of the custody stage of the State district court case. In sum, any declaratory or

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[2]In Texas practice a custodial parent is referred to as the managing conservator. The trial court may appoint a parent as the sole managing conservator or it may appoint both parents joint managing conservators. Tex. Fam. Code Ann., section 14.01 (Vernon Supp. 1991). A non-custodial parent is typically appointed as the possessory conservator. Id., section 14.03.

injunctive relief would necessarily be a collateral attack in federal court on a State court judgment. Such actions are barred by the Rooker-Feldman doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The Fifth Circuit has properly applied the Rooker- Feldman doctrine to challenges to State court child custody proceedings several times. *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986); *Reed v. Terrell*, 759 F.2d 472 (5th Cir. 1985); *Brinkmann v. Johnston*, 793 F.2d 111 (5th Cir. 1986).

Third, Stem never stated any lawful basis for injunctive relief. Such relief would be barred by the Anti-Injunction Act. 28 U.S.C. section 2283. The Act states:

> "A Court of the United States may not grant an injunction to stay the proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Petitioner alleged that he was injured by being awarded possessory conservatorship rather than managing conservatorship over his children. As implied above, to avoid asking for a moot remedy any declaratory or injunctive relief must effectively vacate the orders of the State district court in the divorce case. The Anti-Injunction Act prohibits this remedy, unless one of the exceptions apply. Stem has never alleged anything that constitutes an exception to these provisions. Hence, Stem's claim for injunctive relief is barred.

Finally, because any claim for injunctive relief would merely lead to relitigation of the State district court's custody determination, relief is barred by claim preclusion. Under U.S. Const. Art. IV, section 1 and 28 U.S.C. section 1738, federal courts must give state court judgments the

same preclusive effect that a court in that state would give it, even in section 1983 actions. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).

II.

Petitioner lays claim to numerous supposed violations of his constitutional rights, none of which are sufficient to deny qualified immunity to Respondents. Petitioner's overall approach is one that substitutes creative writing for legal analysis; it thereby fails to raise any substantive issues. A typical example of the rights which Stem alleges were violated include the rights to notice and to confront witnesses. These are actually the rights of criminal defendants.

Stem never cites any law supporting this novel theory. (Respondents, however, will cite authority for the proposition that the Constitutional rights of criminal defendants are inapplicable in civil cases. *Smith v. Edmiston*, 431 F.Supp. 941, 945 (W.D. Tenn. 1977). Stem's theory clearly has no established analytical foundation. Because of this, Stem has not stated a violation of clearly established law under *Harlow v. Fitzgerald*, supra.

This same sort of analysis can be extended to the remainder of Stem's analysis of qualified immunity. For example, Stem claimed his rights were violated when Texas Department of Human Services' employees allegedly violated Harris County Children's Protective Services guidelines, despite the fact that internal guidelines create no due process entitlements. *Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988); *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1229-1230 (5th Cir. 1985). In other instances, Stem has cited Texas State law in support of his claims despite the fact that 42 U.S.C. 1983 exists to redress violations of federal rights. *Gomez v. Toledo*, 446 U.S. 620,

100 S.Ct. 1920 (1980). Stem has cited *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), for the proposition that "family integrity" represents a constitutionally protected interest despite the fact that the court declined to find such an interest. (In Moore the plaintiffs attacked a state court proceeding alleging that the custody case violated their right to "family integrity.") The Supreme Court, however, never reached the issue of whether a general allegation of "family integrity" states a constitutionally protected interest. Instead, the Supreme Court held that this collaterally attacked a State court custody procedure, abstained under *Younger v. Harris*, and dismissed the case. Moore, supra, 442 U.S. at 435-436, 99 S.Ct. at 2283. Stem has consistently ignored *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988).

The Petitioner has clearly founded his lawsuit on the existence of rights for which no legal authority can be found. Close scrutiny of those claims generally leads to the conclusion that the law is contrary to his claims. He has not in any instance been able to comply with Harlow; he has not been able to satisfy *Elliott v. Perez*, supra. He has cited cases for propositions of law which they will not support. It has become perfectly clear that the Petitioner's strategy is to scatter as much shot as possible in the hope that some will find a receptive target. This approach treats with disdain the prior pronouncements of this Court and of the Court of Appeals. Clearly, in the absence of any support for his theories, Petitioner's arguments should be rejected.

Respondents pray that this Court therefore deny Petitioner's Petition For Certiorari.

Respectfully submitted,

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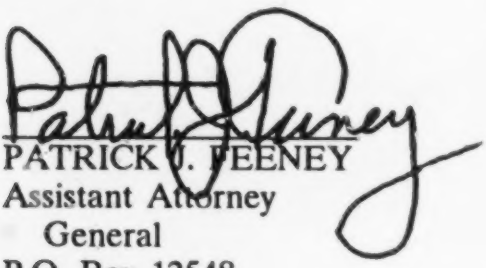

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been sent via U.S. Mail, certified, return receipt requested on this the 12th day of December, 1990 to:

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Assistant Attorney
General

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	H-88-2313
V.	§	
	§	CIVIL ACTION NO. _____
RALPH AHEARN, CHRIS CARD,	§	
HARRIS COUNTY CHILDREN'S	§	
PROTECTIVE SERVICE, and	§	RECEIVED
HARRIS COUNTY,	§	
	§	AUG 30 1988
Defendants.	§	

MARY KELLER

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, STEPHEN C. STEM, Plaintiff, complaining of RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY, Defendants, and in support thereof would show unto the Court as follows:

1. Jurisdiction is founded on the existence of a Federal question and the amount in controversy. 28 U.S.C. §1331 and 28 U.S.C. §1343. This action arises under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C.A. §§1983 and 1985. The amount in controversy, exclusive of interest and cost, exceeds the sum of $10,000 against each of the Defendants.

2. Plaintiff, STEPHEN C. STEM, is the father of two small children, SARAH ELIZABETH STEM and STEPHEN C. STEM, Jr. At the time of the filing of this Complaint, SARAH ELIZABETH STEM is five years old, having been born on June 7, 1983, and STEPHEN C. STEM, Jr., is three years, nine months of age, having been born on November 4, 1984.

3. At all times material to this Complaint, the Defendant, RALPH AHEARN was an employee of HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and HARRIS COUNTY, and was under the supervision of CHRIS CARD.

4. At all times material to this Complaint, the Defendant, CHRIS CARD, was the immediate supervisor of RALPH AHEARN at HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES.

5. At all times material to this Complaint, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES is the part of the HARRIS COUNTY which investigates child abuse and sexual abuse of children in HARRIS COUNTY, Texas.

6. On June 5, 1986, Plaintiff's wife, LEE ANNE STEM filed a divorce against STEPHEN C. STEM on the grounds that the marriage had become insupportable because of conflict and discord between LEE ANNE STEM and STEPHEN C. STEM that destroyed the legitimate ends of the marriage relationship and prevented any reasonable expectation of reconciliation. In late June and early July of 1986, STEPHEN C. STEM and his wife were able to work out an informal agreement that provided, in essence, that both parents acted as the Temporary Joint Conservators for their children, SARAH ELIZABETH STEM and STEPHEN C. STEM, Jr. (Joint Custody), that STEPHEN C. STEM would have possession of the children from 6:00 p.m. on the first Wednesday of each month to 6:00 p.m. on the following Sunday, from 6:00 p.m. on the third Wednesday of each month to 6:00 p.m. on the following Sunday, and that during the weeks when he didn't have the children over the weekend, he would have the children from 6:00 to 8:30 p.m.

on Thursday, LEE ANNE STEM would have the children at all other times unless the parties agreed otherwise. This informal agreement was reduced to a memorandum dated July 9, 1986, and initialed by the parties.

7. On Sunday, August 24, 1986, in accordance with their agreement, STEPHEN C. STEM returned SARAH ELIZABETH STEM and STEPHEN C. STEM, Jr. to LEE ANNE STEM.

8. On Monday, August 25, 1986, LEE ANNE STEM took SARAH ELIZABETH STEM to Texas Children's Hospital, reported that STEPHEN C. STEM had sexually abused his daughter, that when SARAH ELIZABETH STEM was returned to LEE ANNE STEM the day before by STEPHEN C. STEM, that SARAH ELIZABETH STEM complained that her vagina hurt, and that LEE ANNE STEM had inspected SARAH ELIZABETH STEM's genital area and found a small tear between the vagina and the rectum. In spite of these allegations, Dr. Gunn found no such tears. The physical exam of SARAHH ELIZABETH STEM was normal. Proceeding cautiously, Dr. Gunn did a blood test, throat cultures, vaginal cultures and rectal cultures on SARAH ELIZABETH STEM to determine if she had been sexually abused; all of these medical tests turned out to be negative.

9. On or about August 25, 1986, RALPH AHEARN of the HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES received a referral regarding sexual abuse by STEPHEN C. STEM of his daughter, SARAH ELIZABETH STEM. Mr. Ahearn set up an appointment with LEE ANNE STEM and did meet with LEE ANNE STEM and SARAH ELIZABETH STEM on or about August 28, 1986. LEE ANNE STEM and SARAH ELIZABETH STEM were taken into a room at HARRIS COUNTY CHILDREN'S PROTECTIVE

SERVICES where they met together with RALPH AHEARN for approximately one hour; there was no video camera in this room, no recording or any other device to preserve the allegations that were being made against STEPHEN C. STEM, in front of his child. Next, RALPH AHEARN took SARAH ELIZABETH STEM into a video room by herself to videotape SARAH ELIZABETH STEM with "anatomically correct" dolls and to ask her questions about the alleged sexual abuse. However, SARAH ELIZABETH STEM would not recite the story to RALPH AHEARN in the video room, so RALPH AHEARN then had LEE ANNE STEM come into the video room where he sought to make a video of SARAH ELIZABETH STEM concerning the purported sexual abuse by STEPHEN C. STEM. Throughout the entire video LEE ANNE STEM remained present, and in many cases encouraged SARAH ELIZABETH STEM. The statements obtained during the video are in many cases inconsistent with the statements made by LEE ANNE STEM, and are inconsistent with purported hearsay statements made to RALPH AHEARN on September 8, 1986, in an unrecorded conversation with SARAH ELIZABETH STEM.

10. The Defendants, RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY, did not notify STEPHEN C. STEM that they were going to seek to conduct a video examination of his daughter and accuse him of sexually molesting his daughter. They didn't give him the opportunity of notice or the opportunity to be present. They did give LEE ANNE STEM the opportunity to be present, and they did not give STEPHEN C. STEM an opportunity to examine his daughter.

11. On August 27, 1986, LEE ANNE STEM caused her attorney, Michael Toomey, to file with the divorce court, her request, in essence, that LEE ANNE STEM be appointed the Managing Conservator of the children, being the person with all of the rights of a parent, to the exclusion of STEPHEN C. STEM. Significantly, this request was filed with the Court after Dr. Gunn found no physical evidence of sexual abuse and before LEE ANNE STEM ever met with HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and RALPH AHEARN regarding the possible investigation of sexual abuse.

12. In the August 28, 1986 meeting, RALPH AHEARN informed LEE ANNE STEM that she should not allow the child's father, STEPHEN C. STEM, to see his children, and that she should not allow him to even talk to his own children on the phone. As will be described later, Defendant, RALPH AHEARN, never contacted STEPHEN C. STEM to explain to him any of the allegations that were being made against him by LEE ANNE STEM. The actions by RALPH AHEARN in advising LEE ANNE STEM to allow STEPHEN C. STEM to have no contact whatsoever with his children amounted to a de facto termination of his parental rights by HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and RALPH AHEARN, without any due process of law -- or for that matter, any process.

13. Then LEE ANNE STEM informed STEPHEN C. STEM that he could not see his children and he could not talk to his children on the phone, and that she could not tell him the reason why and that he would have to find out the reasons

through his attorney, who would have to find out from her attorney. As will be shown later, on September 9, 1986, LEE ANNE STEM's attorney, Michael Toomey, within ten minutes of the court time, was still not disclosing to STEPHEN C. STEM or to his attorney that LEE ANNE STEM, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and RALPH AHEARN were fixing to walk into a hearing and accuse STEPHEN C. STEM of sexual molesting his daughter.

14. It is alleged that RALPH AHEARN knew that LEE ANNE STEM's attorney was an influential member of the Texas Legislature. It is known that RALPH AHEARN talked to LEE ANNE STEM's attorney from RALPH AHEARN's home, and possibly from HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES. RALPH AHEARN still did not contact STEPHEN C. STEM to investigate the allegations of sexual abuse against STEPHEN C. STEM.

15. It is believed that the Defendant, RALPH AHEARN, again talked to Michael Toomey on September 8, 1988, and was apprised of the fact that there was a court hearing for the next day, and that RALPH AHEARN needed to make a home study or home visit with the child prior to the September 9, 1986 court hearing.

16. On the evening of September 8, 1986, Defendant, RALPH AHEARN, went to visit LEE ANNE STEM and SARAH ELIZABETH STEM in their home; however, in fact he did not visit them in their house, but rather he visited LEE ANNE STEM and SARAH ELIZABETH STEM in LEE ANNE STEM's parents' house. Supposedly, at this meeting, which RALPH AHEARN failed to videotape or

record, SARAH ELIZABETH STEM privately informed him that something icky had come out of her father's penis and gotten on her stomach or tummy.

17. During the lunch hour on September 8, 1986, Defendant, RALPH AHEARN, called STEPHEN C. STEM's office number, and left a message at approximately 12:30 p.m. for STEPHEN C. STEM to return the call -- the message did not say who RALPH AHEARN was with, or why he was calling. Of course, it was during the lunch hour when STEPHEN C. STEM was out of his office. After lunch Plaintiff, STEPHEN C. STEM, phoned Defendant, RALPH AHEARN, at the number given, the phone was answered by HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, Plaintiff asked the secretary of HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES to speak to Mr. Ahearn, and was advised that Defendant, RALPH AHEARN, was not in the office nor would he be in the office for the remainder of the day.

18. On the morning of September 9, 1986, Mr. Toomey would not state why the Joint Managing Conservatorship that had been worked out by the parties and reduced to memorandum on July 9, 1986, had not been successful. Literally as proceeding into the hearing room, RALPH AHEARN appeared, introduced himself, and said that he was down there to testify that STEPHEN C. STEM had sexually abused his daughter. Defendant, RALPH AHEARN's claim caught STEPHEN C. STEM totally by surprise.

19. Immediately after the September 9, 1986 hearing was cancelled, Defendant, RALPH AHEARN, told Plaintiff, STEPHEN C. STEM, that he believed that Plaintiff, STEPHEN C.

STEM, sexually molested his three year old daughter because the three year old was reluctant to talk about the "lurid" incident which indicated that the incident had indeed taken place, that the three year old had described the alleged incident to him in detail and that he had this description on videotape in his briefcase, and that he had medical verification.

20. In fact, the videotape does not demonstrate any "lurid" incident. In fact, the Defendant, RALPH AHEARN, knew on the morning of September 9, 1986, that no medical verification existed, and he knew, in fact, that the medical findings of the doctor regarding an alleged tear between the vagina and the rectum were contradictory to the statements of LEE ANNE STEM.

21. As a result of these allegations of sexual abuse by Defendant, RALPH AHEARN, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY, your Plaintiff, STEPHEN C. STEM, lost the Joint Conservatorship informal agreement which he had with his wife in early July, 1986, his wife ended up being appointed the Managing Conservator of his children and was given all of the rights of a parent to the exclusion of STEPHEN C. STEM, except for the limited visitation rights which he was ultimately able to obtain. STEPHEN C. STEM did not get to see his children, be around his children, or even talk with his children for many months. STEPHEN C. STEM had to spend money on psychologists and psychiatrists to prove that he was not a pervert or a sexual molester of his daughter and the Plaintiff, STEPHEN C. STEM, still lives in fear of false accusations. Your Plaintiff, STEPHEN C. STEM, has suffered past mental anguish, is

presently suffering mental anguish and in all probability will suffer mental anguish for the indefinite future, if not for the rest of his life.

22. Your Plaintiff, STEPHEN C. STEM, alleges that it has been the custom, practice, and policy of Defendants, RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY to fail to establish and use reasonable screening procedures to eliminate the false accusations of sexual molestation against fathers, such as STEPHEN C. STEM, and in fact against STEPHEN C. STEM.

23. Your Plaintiff alleges that it is the custom, practice, and policy of Defendants, RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY to fail to establish and use reasonable screening and investigative procedures when a divorce is pending, to eliminate false accusations of sexual molestation against father, knowing full well that in the vast majority of cases where a divorce is pending and where such accusations are made in connection with a child custody battle, that such accusations are false.

24. Your Plaintiff, STEPHEN C. STEM, alleges that Defendant, RALPH AHEARN, was grossly negligent in failing to investigate the discrepancy between LEE ANNE STEM's allegations of a tear between the vagina and the rectum, and the doctor's determination on August 25, 1986, that no such tear existed. The Defendant, CHRIS CARD, was grossly negligent in failing to supervise Defendant, RALPH AHEARN, and if necessary, to assign other employees to investigate the discrepancy between LEE ANNE

STEM's statements and the doctor's findings. The Defendant, HARRIS COUNTY and HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES were grossly negligent in failing to see that Defendant, RALPH AHEARN, investigated these discrepancies, and in failing to establish policies and procedures to make certain that if Defendant, RALPH AHEARN, was not available, that such discrepancies would be timely and efficiently investigated by another social worker.

25. The Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, failed to follow through and promptly determine that the blood test, throat cultures, vaginal cultures, and rectal cultures taken on SARAH ELIZABETH STEM on August 25, 1986, were in fact negative. Your Plaintiff alleges that such failure to follow through is in fact a practice and custom of HARRIS COUNTY and HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES.

26. Your Plaintiff alleges that the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, followed a custom or practice of not timely making home visits in the home of the child so that the children can be observed in a natural surrounding, in order to investigate allegations of sexual abuse. As a matter of fact, in this case, they never made any investigation in the home of LEE ANNE STEM, but rather conducted one in the home of LEE ANNE STEM's parents. They never made any attempt whatsoever to conduct any home investigation or home study in Plaintiff's home.

27. Plaintiff alleges that the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, were grossly negligent in conducting a one-hour session with Plaintiff's child, with her mother present, in the room, without recording it, without giving Plaintiff notice, thereby leaving your Plaintiff, STEPHEN C. STEM, no way to effectively refute what Defendant, RALPH AHEARN, says the Plaintiff's daughter said (rank hearsay). Furthermore, your Plaintiff alleges that it is the custom, practice, and policy of the HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES to allow social workers such as RALPH AHEARN to talk to children regarding sexual abuse by their fathers in the presence of the child's mother without recording the discussion, so that the social worker can then claim that the child made accusations against the father; of course, by failing to record such conversations, the Defendants have effectively denied a father any opportunity to be able to refute whether or not such statements were made to the Defendants.

28. Your Plaintiff alleges that the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, have a custom or practice of allowing mothers to be present in a video room when a video is being taken of a child, and they have a practice of not notifying fathers that a video is being taken, and prohibiting fathers from being present when accusations are being made against them.

29. Your Plaintiff, STEPHEN C. STEM, alleges that Defendant, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE

SERVICES, CHRIS CARD and RALPH AHEARN, were grossly negligent by failing to immediately contact STEPHEN C. STEM, giving notice of the charges against him, and giving him an opportunity to be heard; as a matter of act, your Plaintiff alleges that it is the policy, custom and practice of HARRIS COUNTY, and HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES to not timely contact fathers, to give fathers no notice of allegations against them, and to give fathers no opportunity to be heard before HARRIS COUNTY and HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES conclude that sexual molestation has occurred.

30. Your Plaintiff alleges that for the Defendant, RALPH AHEARN, to advise and inform LEE ANNE STEM that she should not allow SARAH and CHUCK's father to see them, to be present with them, to have them, or to even talk to them, amounts to a de facto termination of the parental rights of the Plaintiff, STEPHEN C. STEM. Your Plaintiff alleges that it is the custom, practice and policy of Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD, and RALPH AHEARN, to use such procedures and methods to effectively terminate the parental rights of fathers.

31. Your Plaintiff alleges that Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and CHRIS CARD, failed to properly train and instruct the Defendant, RALPH AHEARN, in the proper procedures for investigating allegations of sexual abuse and for investigating false allegations of sexual abuse against fathers.

32. Your Plaintiff alleges that Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and CHRIS CARD, fail to implement reasonable policies and procedures to ensure that, if a social worker was not following through on an investigation, or is ill, that the investigation will proceed timely anyway.

33. Your Plaintiff alleges that the Defendant, CHRIS CARD, was grossly negligent in his training, supervision, and management of the Defendant, RALPH AHEARN, and the cases handled by Defendant, RALPH AHEARN.

34. Your Plaintiff alleges that Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, follow the custom, practice and policy of not giving fathers written notice (or for that matter, oral notice or any notice) of the reasons why a father's children are being taken away from him, who he may contact for information relating to his children, or a summary of any of his rights, or explanation of any of the procedures relating to his children.

35. Your Plaintiff says that one of the fundamental rights guaranteed to a person by the United States Constitution is the right of life, liberty, and pursuit of happiness -- and this encompasses the right of a parent with this children. Your Plaintiff alleges that the Defendants, as described in the aforementioned acts, deprived the Plaintiff of his constitutional rights relating to his children.

36. The aforementioned acts of the Defendants deprived Plaintiff of his right to life and liberty without due process of law.

37. Your Plaintiff alleges that the aforementioned deeds, acts, policies, and procedures of the Defendants have denied him the right to be informed as to the nature and the cause of the accusations against him, and the right to confront witnesses against him, in violation of the Constitution of the United States.

38. Your Plaintiff alleges that the aforementioned deeds, acts, customs, practices and policies of the Defendants have deprived him of life and liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

39. Your Plaintiff alleges that the aforementioned acts, deeds, customs, practices and policies of the Defendants have denied him the equal protection of the law.

40. Your Plaintiff alleges that the aforementioned acts, deeds, customs, practices and policies of the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, subjected or caused to be subjected STEPHEN C. STEM, a citizen of the United States, to deprivation of his rights, privileges, or immunities secured by the Constitution and laws. Accordingly, the Defendants are liable to the Plaintiff, STEPHEN C. STEM, for his injuries, and the Plaintiff, STEPHEN C. STEM, now sues the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, for the sum of ONE MILLION DOLLARS ($1,000,000.00) as provided under 42 U.S.C. §1983.

41. Your Plaintiff, STEPHEN C. STEM, alleges that the aforementioned acts, deeds, customs, practices and policies of Defendants, CHRIS CARD and RALPH AHEARN, and others, constitute a conspiracy to interfere with your Plaintiff's civil rights, within the meaning of 42 U.S.C. §1885, and in furtherance of such conspiracy your Plaintiff has been injured in his person and deprived of having and exercising the rights and privileges of a citizen of the United States. Accordingly, the Plaintiff, STEPHEN C. STEM, now sues the Defendants, CHRIS CARD and RALPH AHEARN, for actual damages in the amount of ONE MILLION DOLLARS ($1,000,000.00) as provided for under 42 U.S.C. §1985.

42. Your Plaintiff alleges that the actions of the Defendants, HARRIS COUNTY, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, CHRIS CARD and RALPH AHEARN, exhibit such gross negligence, and reckless disregard for the civil rights of the Plaintiff, that upon final hearing hereof, the trier of the facts should award what are known as exemplary or punitive damages -- that is, damages which are designed to punish the Defendants and to make an example out of the Defendants, so that the Defendants, and others similarly situated, will never engage in such reprehensible conduct again. Your Plaintiff, STEPHEN C. STEM, requests that the trier of facts award FIVE MILLION DOLLARS ($5,000,000.00) in punitive or exemplary damages.

43. This action is brought to enforce the Plaintiff's rights under 42 U.S.C. §§1983 and 1985, and the Plaintiff, upon final hearing hereof, should have and recover judgment against the Defendants for reasonable attorney's fees as part of the cost.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, STEPHEN C. STEM, prays that the Defendants, RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and HARRIS COUNTY, be summoned and required to answer herein, and that upon final hearing hereof, he have and recover judgment against Defendants, RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES and HARRIS COUNTY, jointly and severally, the sum of ONE MILLION DOLLARS ($1,000,000.00) in damages, judgment against Defendants, RALPH AHEARN and CHRIS CARD, jointly and severally for the sum of ONE MILLION DOLLARS ($1,000,000.00), judgment against all Defendants for the sum of FIVE MILLION DOLLARS ($5,000,000.00) punitive or exemplary damages, reasonable attorney's fees, costs of court, and that your Plaintiff, STEPHEN C. STEM, have such other and further relief, both at law and in equity, special and general, to which he may show himself justly entitled.

Respectfully submitted,

Stephen C. Stem

STEPHEN C. STEM, PLAINTIFF

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CSS-709

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
V.	§	
	§	CIVIL ACTION NO. _____
RALPH AHEARN, CHRIS CARD,	§	
HARRIS COUNTY CHILDREN'S	§	
PROTECTIVE SERVICE, and	§	
HARRIS COUNTY,	§	
	§	
Defendants.	§	

DEMAND FOR TRIAL BY JURY

The Plaintiff, STEPHEN C. STEM, demands a trial by jury.

Respectfully submitted,

JOHN K. GRUBB
Attorney for Plaintiff
FBA # 3250
1900 West Loop South, Suite 850
Houston, Texas 77027
(713)961-5533

CAS-709

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN STEM, Plaintiff	§ §	
VS.	§ §	CIVIL ACTION NUMBER H-88-2813
RALPH AHEARN, ET AL, Defendants	§ §	

DEFENDANTS' CARD AND AHEARN
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Attorney General's Office on behalf of Defendants Card and Ahearn in the above cause and files this, its Motion For Summary Judgment.

I.

INTRODUCTION

Plaintiff filed suit against Texas Department of Human Services employees Ahearn and Card alleging that they acted in violation of 42 U.S.C. §1983, 42 U.S.C. §1985 and the United States Constitution.

Plaintiff in his complaint alleges Defendants Ahearn and Card received a complaint alleging that Plaintiff sexually abused his daughter and that Defendants' investigation of that complaint was negligent. Plaintiff alleges that Defendant Card negligently supervised Defendant Ahearn. Plaintiff alleges that Defendants' actions, specifically Defendant Ahearn telling the children's mother not to let

Plaintiff see his children and Plaintiff's subsequent loss of custody of his children amounted to a de facto termination of Plaintiff's parental rights to his children without due process. Plaintiff also complains that his right to confront the witnesses against him and that the right to be informed of charges against him was denied and sues for exemplary and punitive damages under 42 U.S.C. § 1983 and § 1985 and under the equal protection clause. In support of this motion, Defendants rely upon their own pleadings and Plaintiff's pleadings which for the purposes of this motion are assumed to be true and the attachments hereto.

II.

DEFENDANTS AHEARN AND CARD ARE IMMUNE
IN THEIR OFFICIAL CAPACITY BY THE 11TH AMENDMENT

As the Court is aware, individuals who work for the State have two types of immunities from suit. They have an immunity for acts taken in their official capacity as well as for acts taken in their individual capacities. A judgment awarded against a defendant in their official capacity must be satisfied by the State Treasury while a judgment awarded against a defendant in their individual capacity must be satisfied by that individual's personal finances. The immunity for government officials in their official capacity is absolute as liability is barred against the government by the 11th Amendment.

It is well settled law that, unless expressly waived, sovereign immunity, as protected by the Eleventh Amendment, deprives a federal court of jurisdiction to hear a suit against the State or one of its agencies. Pennhurst State School and Hospital v. Halderman, 465 U.S. 88, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The Supreme Court has interpreted the Eleventh Amendment to effectuate its purpose of restoring the "fundamental rule of jurisprudence" that "a state may not be sued without its consent," Ex Parte New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). Thus, the court has decided that a suit for damages against a state by a citizen of the same state, although not specifically prohibited by the Amendment's language, is barred. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); Duhne v. New Jersey, 251 U.S. 311, 40 S.Ct. 154, 64 L.Ed. 280 (1920).

The Fifth Circuit has held that generally, for purposes of Eleventh Amendment and analysis, state agencies are considered arms of the State and are entitled to invoke the constitutional immunity of the State. United Carolina Bank v. Board of Regents, 665 F.2d 553, 557 (5th Cir. 1982).

The doctrine of sovereign immunity as recognized by the Eleventh Amendment precludes relief against State agencies and officials which must be satisfied from the State

Treasury. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 39 L.Ed.2d 358 (1979); Sheurer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Clay v. Texas Women's University, 728 F.2d 714 (5th Cir. 1984); Brandon v. Holt 469 U.S. 464, 105 S. Ct. 873, 83 L.Ed. 2d 878 (1985); Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978).

> "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment." (Citations omitted.) Edelman v. Jordan at 415 U.S. at 663, 94 S.Ct. at 1355-6.

The Texas Department of Human Services (hereinafter referred to as "TDHS") is an agency of the State of Texas. Defendants Ahearn and Card were at all times pertinent to the instant case an official or employee of TDHS and all acts relevant to this cause of action were done in the course of the execution of their official duties. See Attachments A, B, C, and D. The funding of TDHS is governed by State law and is mostly from State Legislative appropriations. Tex.Hum.Res.Code Ann. §21.001, et seq. (Vernon 1980). Consequently, the damages sought by Plaintiff from Defendants Card and Ahearn in their official capacities would have to be paid from State revenues. Thus, Plaintiff's suit is in substance and effect a suit against the

State of Texas, which is the real party in interest and which has not consented to be sued by this Plaintiff. Worchester County Trust Co. v. Riley, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 (1937); Edelman v. Jordan, supra.

Plaintiff has pled no waiver and 42 U.S.C. § 1983 does not constitute a waiver of official immunity. Almond Pharmacy Inc. v. Mankowitz, 587 F.Supp. 925 (N.D. Ill., 1984). The Eleventh Amendment bars Plaintiff's damage claims against the State of Texas, its alter ego TDHS, and all officials in their official capacity. United Carolina Bank, 665 F.2d at 558-9. Therefore, all monetary claims against Defendants Ahearn and Card in their official capacities must be dismissed.

III.

A SUIT BY PLAINTIFF AGAINST MR. CARD AND MR. AHEARN IN THEIR INDIVIDUAL CAPACITIES IS BARRED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

In addition, Mr. Card and Mr. Ahearn are immune from liability in their individual capacities by the doctrine of qualified immunity and Defendants contend that they are entitled to a summary judgment on the basis of their qualified immunity.

Under the doctrine of qualified immunity a defendant may be sued as an individual, whereby any judgment against that individual will be satisfied by that individual's personal finances, only if his conduct violated clearly

established constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Qualified immunity rests on the "objective reasonableness of an official's conduct as measured by reference to clearly established law," that is, law that "was clearly established at the time an action occurred." Id.; Kentucky v. Graham, 473 U.S. 159, 167, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985). "The fulcrum for this objective [test] is the existence, at the time of the official's action, of clearly established judicial decisions that make his action unconstitutional." Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978) cert. denied, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979). No other factors are relevant to qualified immunity but the objective reasonableness of the official's behavior. Harlow v. Fitzgerald, 457 U.S. at 815-819, 102 S.Ct. at 2736-2739; Davis v. Scherer, 468 U.S. 183, 193, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139 (1984).

Even plaintiff-oriented legal commentators now acknowledge that for qualified immunity to be overcome, there must "be little or no ambiguity in relevant case law as a condition to finding settled law; a case on point appears to be required." Nahmod, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION, 383 (Supp. 1985). It is not enough merely to "extrapolate from pre-existing case law." Id. This has long been

the approach of the Fifth Circuit. Sampson v. King, 693 F.2d 566, 570 (5th Cir. 1982); Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1100-1101 (5th Cir. 1981); Dilmore v. Stubbs, 636 F.2d 966, 969-971 (5th Cir. 1981); Bogard v. Cook, 586 F.2d at 420-421. More recently, see Thorne v. Jones, 765 F.2d 1270, 1277 (5th Cir. 1985), cert. den., _____ U.S. _____, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986).

Plaintiff has pled no case law which would establish that at the time of the official's action, there existed clearly established judicial decisions which would make Defendants' actions unconstitutional. Because Plaintiff has failed to cite a case which clearly established Defendants' actions as unconstitutional, and in fact because no such case law exists, Plaintiff has failed to pierce Defendants' Card's and Ahearn's immunity and this case should be dismissed.

To the contrary, Defendants Card and Ahearn were required to act as they did by law. Once TDHS received a report of child abuse, the TDHS was required by law to conduct an investigation to determine if the abuse occurred. Tex. Fam. Code Ann. § 34.05 (Vernon 1986), Attachment A. After the case was assigned to Mr. Ahearn he conducted his investigation as required by law. Tex.Fam.Code Ann. § 34.05

(Vernon 1986). The determination as to whether or not a child has been abused is left to the sole discretion of the TDHS employees. See Attachment A.

In addition the Courts have required Plaintiffs to be explicit when pleading a cause of action which will result in an immunity defense. The Plaintiff must show in his pleadings, in very specific terms, why an immunity defense will not stand.

The 5th Circuit in Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985), held:

> In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.

Id. at 1473.

The U.S. Supreme Court further emphasized this in Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985):

> [U]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

These are substantive rights under federal law, not to be abrogated or abridged by discovery and trial, until the

plaintiff shows a probable right to recovery based upon specific pleading, as Harlow v. Fitzgerald, supra; Forsyth v. Mitchell, supra; and Elliott v. Perez, supra, hold. The qualified immunity defense is such an important doctrine for the protection of public servants from baseless suits, that it is up to the trial judge, even without any motions by opposing parties, to require the Plaintiff to plead those specific facts. Elliott v. Perez, 751 F.2d at 1482. This includes detailed facts supporting the contention that the plea of immunity cannot be sustained. The denial of qualified immunity or the Court's decision to defer ruling on qualified immunity is an immediately appealable order. Mitchell v. Forsyth, 472 U.S. 511, 529, 105 S.Ct. 2806, 2817, 86 L.Ed. 2d 411 (1985); Helton v. Clements 787 F.2d 1016, 1017 (5th Cir. 1986). Because Plaintiff has not specifically pled a cause of action which defeats Defendants' immunity, this cause should be dismissed.

IV.

PLAINTIFF FAILED TO ALLEGE A CAUSE OF ACTION WHICH IS RECOVERABLE UNDER 42 U.S.C. §1983 BECAUSE PLAINTIFF WAS AFFORDED DUE PROCESS

In addition to or in the alternative to the arguments stated above, this cause should be dismissed because Plaintiff was afforded due process. 42 U.S.C. § 1983 states that every person who under color of (state) is (deprived of)

rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured. 42 U.S.C. § 1983 is not a cause of action in and of itself, rather it is a remedy to be utilized when rights secured by a federal law or the U.S. Constitution are violated. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); Curtis v. Taylor 625 F.2d 645 (5th Cir. 1980).

Although Plaintiff does not specifically allege it, as required by law, and assuming that the right to one's child is a right encompassed by the Federal Constitution, although Plaintiff has failed to cite a case which so holds as required by law, Plaintiff still fails to allege an actionable cause of action under 42 U.S.C. § 1983 because Plaintiff was afforded due process.

Plaintiff alleges he was injured (lost custody or joint managing conservatorship of his children) in part because Defendants Ahearn and Card determined that Plaintiff abused his daughter and because Defendant Ahearn told the children's mother to not let her children have any contact with the Plaintiff. That deprivation of his right to have contact with his children is a liberty interest which Plaintiff apparently alleges he was deprived of without due process of law as required by the 14th Amendment to the U.S. Constitution. But in fact Plaintiff was accorded due process before his "liberty" was denied him. In his complaint against

Defendants Ahearn and Card, Plaintiff admits that he lost joint managing conservatorship and the mother was appointed sole managing conservator with Plaintiff getting limited visitation only. Chapters 11 and 14 of the Texas Family Code give state district courts the authority to adjudicate and determine a parent's rights to their children. Plaintiff's due process was afforded him in state district court when that court determined that it was in the best interests of his children that Plaintiff lose his managing conservatorship and limited his visitation rights. See Attachment E. That is all the due process Plaintiff is entitled to and therefore he has failed to state a claim under 42 U.S.C. § 1983 and his cause of action should be dismissed.

V.

PLAINTIFF FAILED TO ALLEGE A CAUSE OF ACTION UNDER 42 U.S.C. §1983 BECAUSE NEGLIGENCE BY A STATE OFFICIAL DOES NOT IMPLICATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In addition or in the alternative to the above stated arguments, this Court should dismiss this cause of action against Defendants because under 42 U.S.C. §1983, negligence is not a "deprivation" within the meaning of the Due Process Clause. Plaintiff appears to allege that the negligent investigation of the complaint of sexual abuse against Plaintiff done by Defendants and Mr. Card's negligent

supervision over Mr. Ahearn resulted in Plaintiff losing custody of his children. Defendants' alleged negligent investigation of the complaint of abuse against Plaintiff and alleged negligent supervision over the investigation does not amount to a "deprivation" under 42 U.S.C. §1983.

The U.S. Supreme Court in Daniels v. Williams held that the Due Process Clause is not implicated by a state official's negligent act causing unintended loss of or injury to life, liberty or property rather, the Due Process Clause was intended to secure an individual from an abuse of power by government officials. Far from abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986).

The same argument would apply to all of Plaintiff's other claims, therefore, all of Plaintiff's claims should be dismissed.

VI.

A CAUSE OF ACTION UNDER 42 U.S.C. §1983 CANNOT BE MAINTAINED UNDER A THEORY OF VICARIOUS LIABILITY OR RESPONDEAT SUPERIOR

In addition to and/or in the alternative to the arguments stated above, it is well settled that liability under

42 U.S.C. §1983 cannot be premised on a respondeat superior or vicarious liability theory. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978); Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Defendant Card was merely Defendant Ahearn's supervisor, he had no personal knowledge of this case and only acted in a supervisory role. (See Attachment B.) Therefore, the cause of action against Defendant Card should be dismissed.

VII.

PLAINTIFF FAILS TO ALLEGE AN ACTIONABLE CAUSE OF ACTION WHEN HE ALLEGES DEFENDANTS VIOLATED HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM AND HIS RIGHT TO NOTICE OF CHARGES AGAINST HIM.

Plaintiff purports to allege Defendants Card and Ahearn violated his right to confront witnesses against him and his right to notice of charges against him apparently as embodied in the 6th Amendment to the U.S. Constitution.

The Courts have clearly held that the 6th Amendment applies to criminal proceedings. Olshausen v. Commissioner, 273 F.2d 23 (9th Cir. 1960). Plaintiff is apparently complaining about not being able to talk to Mr. Ahearn prior to a civil proceeding on his ex-wife's Motion to Modify Plaintiff's Conservatorship. Because it was a civil proceeding

and not a criminal one, Plaintiff's allegations against Defendants have no basis in law and should be dismissed.

More than that, Plaintiff's claims are utterly frivolous. Plaintiff complains that because Defendant Ahearn would not talk to him about the child abuse complaint prior to the modification hearing, which was subsequently postponed until after Ahearn talked with Plaintiff, Plaintiff's right to confront Ahearn and the right to be informed of the charges against him were violated. Clearly Plaintiff's remedy was to use the various discovery devices available to him to discover the evidence Ms. Stem intended to put on at the modification hearing. Plaintiff's unhappiness about the level of preparation he and/or his attorney had for the hearing should be directed at himself and/or his attorney but certainly not at Defendants. Furthermore, Plaintiff makes the claim that because Mr. Ahearn told Ms. Stem not to let Mr. Stem have contact with the children, the Defendants somehow terminated his parental rights. Only a court of law can terminate a parent's legal right to his or her child. If Ms. Stem would not let Plaintiff see his children, then Plaintiff's remedy was to either file a Motion for Contempt against Ms. Stem for violating the visitation order as entered by the state district court or to petition the state court for visitation rights. His remedy is not to sue two

TDHS employees for some sort of civil rights violation.

VIII.

MERE ALLEGATIONS OF CONSPIRACY CANNOT SURVIVE A SUMMARY JUDGMENT MOTION

Plaintiff also purports to sue Defendants under 42 U.S.C. 1985, although Plaintiff has utterly failed to allege any supporting facts or to even specify which subsection of 42 U.S.C. 1985 he sues under. Mere conclusory allegations of a conspiracy without supporting facts cannot survive a summary judgment motion. Henzel v. Gerstein 608 F.2d 654 (5th Cir. 1980); Zentgraf v. Texas A & M University, 492 F. Supp. 265 (S.D. Tex. 1980). Because Plaintiff has made mere allegations of conspiracy this summary judgment should be granted.

IX.

PLAINTIFF HAS FAILED TO ALLEGE AND SHOW A CLASS-BASED ANIMUS

Assuming that Plaintiff sues under 42 U.S.C. 1985 (3) or 42 U.S.C. 1985 (2), Plaintiff has still failed to state an actionable claim because he has not alleged or shown a class-based animus on the part of Defendants.

As the Court is aware, there are two different causes of action set forth in 42 U.S.C. 1985 (2). The first part of 42 U.S.C. 1985 requires that there has been an interference with the federal court system. Daigle v. Gulf State

Utilities Co., Local No. 2286, 794 F.2d 974, 980 (5th Cir. 1980) cert. den., _____ U.S. _____, 107 S.Ct. 648 (1986). Clearly Plaintiff is not suing under that section for Plaintiff has not even referred to or alleged that any proceeding even occurred in federal court.

The second part of 42 U.S.C. 1985 (2) proscribes conspiracies that interfere with the administration of justice in state court. Id. Both the second part of 1985 (2) as well as 1985 (3) are directed at conspiracies that deprive Plaintiff of equal protection and in order to state a claim under the second part of 1985 (2) or (3) Plaintiff must allege a class-based animus. Id. The Fifth Circuit held in Daigle v. Gulf State Utilities Co. Union that ". . . we have held that the Griffin race of class-based animus requirement of §1985 (3) also applies to claims under the second part of §1985 (2)." Daigle at 979.

The Fifth Circuit further held in Earnest v. Lowentritt 690 F.2d 1198, 1202 (5th Cir. 1982) that a failure by Plaintiff to allege or prove any racially based animus underlying the conspiracy mandated dismissal of the action. Here Plaintiff has neither alleged nor proven any racially based animus nor any class-based animus and therefore his 42 U.S.C. 1985 cause of action should be dismissed.

X.

42 U.S.C. 1985 DOES NOT APPLY TO CONSPIRACIES TO DENY DUE PROCESS

Plaintiff in his complaint has apparently alleged that he was denied his liberty interest (access to his child) without due process. Even if access to your child is a liberty interest protected by the Federal Constitution and even if Plaintiff was denied due process, he has failed to state a claim under 42 U.S.C. 1985 because that section of the Civil Rights Act does not give a cause of action for a conspiracy the purpose of which is to deny due process. Rodriguez v. Carroll 510 F.Supp. 547 (S.D. Tex. 1981). As stated above, 42 U.S.C. 1985 applies to conspiracies to deprive a Plaintiff of equal protection. Plaintiff has not alleged a claim under the equal protection clause of the United States Constitution nor is Plaintiff able to. Because Plaintiff's allegations of a denial of due process does not state a claim under 42 U.S.C. 1985, this cause of action should be dismissed.

XI.

PLAINTIFF HAS NOT ALLEGED A CONSPIRACY AS CONTEMPLATED BY 42 U.S.C. 1985

Plaintiff alleged in Paragraph 41 of his Complaint that the "aforementioned acts, deeds, customs, practices and policies of Defendants Chris Card and Ralph Ahearn" and unnamed "others" constitutes a conspiracy to interfere with Plaintiff's civil rights. The courts have long held that a

conspiracy as contemplated in 42 U.S.C. 1985 does not include acts by a single business entity even though there were two or more agents participating in the act. Dombrowski v. Dowling 459 F.2d 190 (7th Cir. 1972).

In the present case, Plaintiff has alleged that Defendants Card and Ahearn conspired against him. Defendants Card and Ahearn are employees of and agents of the Texas Department of Human Services. See Attachments A, B, C and D. Because Defendants Card and Ahearn and the State agency are a single legal entity they cannot conspire with themselves. The present situation is analogous to Zentgraf v. Texas A & M where Plaintiff sued the University and its officials for conspiring to deprive Plaintiff of her civil rights. The Court dismissed her claim holding that the University and its officials constitute a single legal entity which cannot conspire with itself in violation of § 1985. Zentgraf, 492 F.Supp. at 273. Because Defendants Card and Ahearn do not constitute a conspiracy as contemplated by 42 U.S.C. 1985, this summary judgment should be granted.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court grant their Motion for Summary Judgment and assess attorney's fees and costs against Plaintiff for filing a frivolous motion.

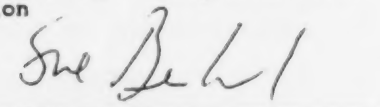
Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

DELMAR L. CAIN
Chief, Tort Litigation Division



SUE BERKEL
Assistant Attorney General
State Bar No. 02202525
Tort Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2197 Ext. 520

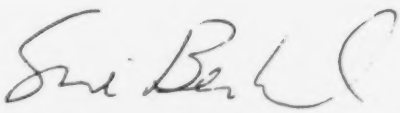
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record, by certified mail, return receipt requested, on this, the 16 day of DECEMBER, 1988, addressed as follows:

John Grubb
1900 W. Loop S., Suite 850
Houston, TX 77027

Eric H. Nelson
3303 Main, Suite 300
Houston, Texas 77002-9392

Roderick Q. Lawrence
1001 Preston
Houston, TX 77002



SUE BERKEL
Assistant Attorney General

VERIFICATION

THE STATE OF TEXAS §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared SUE BERKEL, known to me to be the person whose name is subscribed to the foregoing instrument, and who, after being by me duly sworn, upon her oath, deposes and says: that she is an Assistant Attorney General of the State of Texas and is familiar with the facts of this case, that she is authorized to make this affidavit, that she has read the foregoing instrument, and that the facts stated therein are true and correct to the best of her knowledge and belief.

Sue Berkel

SUE BERKEL

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this, the 16th day of December, 1988, to certify which witness my hand and seal of office.

Angelina Guerrero

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

Printed Name of Notary

My Commission Expires:

OFFICIAL SEAL
ANGELINA GUERRERO
NOTARY PUBLIC
STATE OF TEXAS
My Comm Expires 11/30/89

IN THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVEN C. STEM	$	
	$	
V.	$	
	$	ACTION CIVIL NO. H-88-2813
RALPH AHEARN et.al.	$	
	$	

AFFIDAVIT OF RALPH AHEARN

STATE OF TEXAS	$
	$
COUNTY OF HARRIS	$

BEFORE ME, the undersigned official on this day appeared Ralph Ahearn who is known to me and first being duly sworn according to law upon his oath deposed and said:

My name is Ralph Ahearn. I am over eighteen years of age and I currently reside and work in Harris County, Texas. I have never been convicted of a crime and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are all true and correct.

I am a protective services caseworker with the Texas Department of Human Services located in the Houston office. I have been so employed from April 1, 1984 to present. My duties as a case worker require that I investigate referrals alleging abuse or neglect of children and that I make a determination as to whether the abuse or

A

neglect occurred and whether the Department of Human Services needs to take any action so as to protect the interest of the minor children who are the subject of the referrals.

On the 25th day of August 1986, the Department of Human Services received a referral from a medical doctor that Sara Stem was potentially sexually abused. I was assigned to investigate the referral on that same date. As a part of my investigation which I was required to make by state law, I interviewed the child victim several times as well as several other persons who might have knowledge of the sexual abuse. I conducted my investigation pursuant to the standards and procedures set out in the child protective services handbook.

Based on my investigation, as is reasonable practice in my profession, I determined in my discretion that Sara Stem had been sexually abused by her father, the plaintiff.

At all times during my investigation I acted in good faith as I felt I was required to under the law and all acts relevent to the cause of action were done in the course of the execution of my official duties. I am not aware that anything that I did in this case would be likely to violate Plaintiff's civil rights nor am I aware that anything I did resulted in violating the Plaintiff's constitutional or

civil rights. I have no ill will towards the Plaintiff Stem and I did not conspire with anyone or any entity to deprive Stem of any of his consitiutional or civil rights.

Ralph Ahearn

SUBSCRIBED AND SWORN TO before me on the 3rd day of November, 1988 to certify which witness my hand and official seal.

Angelita R. Simental

Notary Public

State of Texas

ANGELITA R SIMENTAL

Printed Name

My Commission Expires: 9/30/92

ANGELITA R. SIMENTAL
NOTARY PUBLIC STATE OF TEXAS
MY COMMISSION EXPIRES
SEPT. 30, 1992

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN STEM, Plaintiff	§ § §	
VS.	§	CIVIL ACTION NUMBER
	§	H-88-2813
RALPH AHEARN, ET AL, Defendants	§ §	

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF §

Before me, the undersigned authority, on this day personally appeared Chris Card, known to me to be the person whose name is subscribed hereto, and who, after being by me duly sworn, upon his oath deposed and said:

"My name is Chris Card and I make this affidavit in connection with the case styled Stem v. Ahearn, et al. I am over 18 and mentally competent to make this affidavit with personal knowledge of the facts stated therein, such facts being true and correct.

In my previous position as the Children's Protective Services Supervisor of the Texas Department of Human Services, I was responsible for overseeing all of the Department's child protective services cases in Unit 12 in

the Harris County region. I was so employed from January, 1983 to February 29, 1988. My duties did not require me to conduct investigations of child abuse complaints and I did not conduct the investigation in the Sara Stem case. My duties do require me to discuss Mr. Ahearn's progress and findings in the Sara Stem case with Mr. Ahearn and I did that. Furthermore my duties do require me to approve or disapprove a caseworker's findings of abuse or/and neglect and in this case I did concur with Mr. Ahearn's determination that Plaintiff did sexually abuse his daughter, Sara Stem, and signed off on the caseworker's fact findings. I took no other action in this case.

I had no reason to believe that any action that I took in the Sara Stem case would be likely to violate Plaintiff's rights nor am I aware that anything that I did violated Plaintiff's rights. I have no ill will towards Plaintiff Stem and I did not conspire with anyone or any entity to deprive Plaintiff of any of his civil rights. All actions that I took with regard to this case were done within the scope of my duties and in good faith."

CHRIS CARD

SWORN TO AND SUBSCRIBED before me this 3rd day of December, 1988.

Judy Bettencourt
Notary Public in and for
The State of Texas

JUDY BETTENCOURT
Printed Name of Notary

My Commission Expires:

1-26-92

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVEN C. STEM,	§	
	§	
Plaintiff,	§	
	§	
V.	§	
	§	
RALPH AHEARN, CHRIS CARD, HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES, and HARRIS COUNTY,	§	CIVIL ACTION NO. H-88-2813
	§	
	§	
	§	
	§	
Defendants.	§	

SUPPLEMENTAL AFFIDAVIT OF GEORGE FORD IN SUPPORT OF HARRIS COUNTY CHILDREN'S PROTECTIVE SERVICES BOARD'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGEMENT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared GEORGE FORD, who, being by me duly sworn, upon oath stated:

"I am over 21 years of age and am a resident of Harris County, Texas. My office address is 4040 Milam, Houston, Texas 77006.

I, George Ford gave an affidavit in *Stem v. Ahearn, et. al.*, civil action number H-88-2813, on August 22, 1988 in support of Defendant Harris County Children's Protective Services Board's Motion to Dismiss, or in the alternative,

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10-13

Motion for Summary Judgement. By this affidavit, I am supplementing the prior affidavit in this matter.

Defendants Ralph Ahearn and Chris Card were not paid by Harris County Children's Protective Services Board. Since Mr. Ahearn and Mr. Card at all relevant times were employees of Texas Department of Human Services, it is my understanding they received their payroll checks from Texas Department of Human Services on a State of Texas payroll check issued through the office of the State Comptroller.

The position of the Harris County Children's Protective Services Board is that no judgment against it in this cause is possible, since it was not the employing entity, and was thus not responsible for any possible cause of action. If a judgment were rendered against Mr. Card and Mr. Ahearn, it would be the position of Harris County Children's Protective Services Board that it would not be responsible for any judgment, since, in fact they were not employees of Harris County Children's Protective Services Board.

Case Worker Kay Anderson, like Mr. Card and Mr. Ahearn, is employed, supervised, paid and directed by Texas Department of Human Services.

A true and correct copy of the bylaws of the Board of Harris County Children's Protective Services is attached hereto as Exhibit "A", and incorporated by reference."

George Ford

AFFIANT, GEORGE FORD

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing instrument has been furnished to the following, by first class mail, postpaid, on this the 13th day of October, 1988:

Mr. John K. Grubb
1900 West Loop South at San Felipe
Houston, TX 77027

Ms. Sue Berkel
Assistant Attorney General
P. O. Box 12548
Austin, Tx 78711-2548

Mr. Roderick Q. Lawrence
Assistant County Attorney
1001 Preston, Suite 634
Houston, TX 77002

Eric H. Nelson

BY-LAWS OF THE HARRIS COUNTY

CHILDREN'S PROTECTIVE SERVICES BOARD

(As Adopted February 23, 1984)

BY-LAW NO. 1: NAME

The name of the organization (hereinafter referred to as the ("Board") is the Harris County Children's Protective Services Board.

BY-LAW NO. 2: PURPOSE

The Board shall be responsible for the protective services program for the children of Harris County as expressed in the 1966 Agreement between Harris County Commissioner's Court and the Texas Department of Public Welfare (now Texas Department of Human Resources), and in the 1978 Memorandum of Agreement between Harris County Commissioner's Court, and the Texas Department of Human Resources.

BY-LAW NO. 3: MEETINGS

A. The regular monthly meetings of the Board will be held on the fourth (4th) Thursday of each month at 12:30 p.m. in the office of Harris County Children's Protective Services or at such time and place as may be designated by the Board President.

B. The election of officers shall take place at the March Board meeting.

C. Special meetings of the Board may be called by the President or Vice-President at the request of any member.

D. Written notice shall be furnished to each Board member of the date, time, and place for all Board meetings. Notice of Board meetings shall be posted for at least 72 hours preceeding the day of the meeting.

E. A quorum shall consist of the number of Executive Committee members plus one.

F. Any Board member with fifty percent (50%) or more unexcused absences from regular monthly meetings of the Board during any consecutive twelve (12) month period or three (3) consecutive unexcused absences shall be deemed to have resigned as a member of the Board. An unexcused absence is one not excused by the President of the Board.

BY-LAW NO. 4: BOARD OF DIRECTORS

A. The Board shall have such powers and authority and perform such duties as shall be conferred on it by the Harris County Commissioner's Court and the Texas Department of Human Resources.

B. The Board shall consist of fifteen (15) members.

C. Board members shall be appointed by Harris County Commissioner's Court for a term of three (3) years. The terms of office of each Board member so selected shall commence on January 1 of the year so designated by the Harris County Commissioner's Court. The terms of the Board members shall be staggered so that the terms of no more than five (5) members of the Board shall end in any one year.

D. If a vacancy shall occur on the Board by reason of death, resignation, excessive absences (as per By-Law No. 3F) from Board meetings, or otherwise, the Board shall request the Harris County Commissioner's Court to appoint a successor or successors for the unexpired term or terms.

E. At the expiration of his/her term of office, any Board member may be re-appointed to the Board at the discretion of the Harris County Commissioner's Court.

F. Upon appointment by the Harris County Commissioner's Court new Board members will draw lots to ascertain the expiration dates of their terms, if necessary.

BY-LAW NO. 5: OFFICERS OF THE BOARD

A. The officers of the Board shall consist of President, Vice-President, Secretary, and Treasurer.

B. The officers of the Board shall be elected at the March meeting by an affirmative vote of a majority of the Board members present. Each officer shall serve for one year and shall be eligible for re-election to the same position for one additional consecutive term. No person shall be elected President or Vice-President of the Board who has not served on the Board for at least one year prior to his/her election.

By-Laws

As Adopted February 23, 1988

C. Any officer may be removed at any time by an affirmative vote of the majority of the Board. Any vacancy occurring in any office of the Board shall be filled by the Board at the next Board meeting, by an affirmative vote of a majority of the Board members present.

D. Only the President, or the President's designee, shall make a public statement on behalf of the Board. The President of the Board shall preside at all meetings of the Board. The President shall be the chief executive of the Board, performing all duties commonly incident to the office and such other duties as the Board shall designate from time to time. The Vice-President shall be vested with all the powers and shall perform all of the duties for the President in case of the absence or disability of the President; in addition, the Vice-President shall have such powers and perform such duties as the Board may from time to time determine. The Secretary shall be responsible for the minutes of the Board, shall perform all of the duties commonly incident to the office, and shall perform such other duties and have such other powers as the Board shall designate from time to time. The Treasurer shall serve as Chair of Budget Committee, shall perform all of the duties and have such other powers as the Board shall designate from time to time.

E. The officers of the Board shall have authority to sign checks written by Harris County Children's Protective Services.

BY-LAW NO. 05: COMMITTEES

The Board Committees shall consist of an Executive Committee, and such standing Committees as may be designated by the Executive Committee.

A. The Executive Committee consisting of the President, Vice-President, Secretary, Treasurer, and any other member as designated by the President shall meet monthly in advance of the full board meeting. The Executive Committee will be chaired by the President or his designee. The Executive Committee will review recommendations from standing committees and establish the agenda for Board meetings. Actions of the Executive Committee must be approved by the Board.

B. Members to the standing committees shall be appointed by the President annually in April. Committee Chair shall establish frequency, day, time, and place of committee meetings. Committee reports shall be presented to the board at its meeting. Recommendations for actions by the Board will be presented to the Executive Committee.

C. Ad-Hoc committees as necessary from time to time may be appointed by the President.

BY-LAW NO. 7: STAFF

A. The Executive Director of Harris County Children's Protective Services is employed by the Board. An annual contract is negotiated each August for a twelve month period beginning September 1 and ending August 31.

B. Responsibilities of the Executive Director include but are not limited to the following:

1. Administration of expenditures of all County Funds
2. The employment, supervision, and termination of all Board paid employees
3. Coordination of local services with the Texas Department of Resources
4. Implementation of agency programs through supervision of Board staff
5. Interpretation of Board policy to this staff

C. The Executive Director will attend monthly meetings of the Board's Executive Committee and the full board meeting and will personally attend or have a representative present at the meetings of various committees of the board.

BY-LAW NO. 8: FISCAL YEAR OF AGENCY

The fiscal year of Harris County Children's Protective Services shall be January 1st through December 31st.

BY-LAW NO. 9: RULES OF ORDER

The meetings of the Board shall be conducted according to Roberts' Rules of Order, Revised.

BY-LAW NO. 10: AMENDMENTS TO BY-LAWS

These By-Laws may be altered, amended, repealed, or replaced by a majority of the entire Board at any meeting called for the purpose, provided a written notice of changes proposed is given within thirty days of such meeting when said changes are to be considered along with the notice of the meeting.

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared Marlin W. Johnston, who, being by me duly sworn, upon oath stated:

"I am over 21 years of age and am a resident of Travis County, Texas. My office address is 701 West 51st Street, Austin.

"I am the Commissioner of the Texas Department of Human Services, as established by Texas Human Resources Code section 21.004. Pursuant to Texas Human Resources Code section 21.005, I and previous Commissioners have established divisions within the Texas Department of Human Services which are necessary for the discharge of the Department's functions, and I have employed personnel necessary for the administration of the Department's duties. Further, I have established a system of local administration to carry out the purposes of the Texas Human Resources Code, as set out in section 21.006 of that Code.

"One duty of the Department under the Human Resources Code is to "promote the enforcement of all laws for the protection of illegitimate, dependent, neglected, and delinquent children." (H.R.C. section 41.001) And, Texas Family Code Chapter 34 requires the Department to receive and investigate reports of abuse and neglect to children.

"To carry out the duty to protect abused and neglected children, the Department has established local offices throughout the State. Ralph Ahearn

D

and Chris Card were employees of the Texas Department of Human Services in Houston at the time of the Department's investigation of child abuse perpetrated by the Plaintiff, Stephen Stem. Ralph Ahearn's state merit system job title was "Childrens Protective Services Specialist II"; Chris Card's state merit system job title was "Childrens Protective Services Supervisor." As with all Department employees in these positions, all wages and other benefits to these persons were provided solely by the State of Texas. The chain of command to which they must report would be as follows:

Childrens Protective Services Specialist (caseworker)
reports to:
Childrens Protective Services Supervisor reports to:
Program Director for Protective Services to
Families and Children reports to:
Regional Director for Protective Services to
Families and Children reports to:
Regional Administrator, Region 11, Texas Department
of Human Services reports to:
Deputy Commissioner for Field Management reports to:
Executive Deputy Commissioner reports to:
Commissioner reports to:
Texas Department of Human Services Board

"As with all Department staff, Ralph Ahearn and Chris Card at all times were subject to the supervision and direction of the Texas Department of Human Services, and were never subject to the supervision or direction of any entity at the county or municipal level."

Marlin W. Johnston
Commissioner, Texas Department of
Human Services

SUBSCRIBED AND SWORN to before me by Marlin W. Johnston on this day, the 15th day of DECEMBER, 1988.

Michele E. Hughes
Notary Public in and for
Travis County, Texas

MY COMMISSION EXPIRES:
OCTOBER 19, 1989

Historical Note

Prior Law:

Acts 1939, 46th Leg., p. 544.
Acts 1941, 47th Leg., p. 914, ch. 582, § 1.
Acts 1965, 59th Leg., p. 700, ch. 297, § 1.
Acts 1977, 65th Leg., p. 1371, ch. 543, § 1.
Vernon's Ann.Civ.St. art. 695c, §§ 2(1), (2), (3), 3(2).

Cross References

Administrative Procedure and Texas Register Act, see Vernon's Ann.Civ.St. art. 6252—13a.

Travel Regulations Act of 1959, see Vernon's Ann.Civ.St. art. 6823a.

Library References

Social Security and Public Welfare ⇨4.
States ⇨67.
C.J.S. Social Security and Public Welfare §§ 6, 7.
C.J.S. States §§ 130, 131, 134 to 138, 140.

Notes of Decisions

1. In general

Speaker of House of Representatives could not remove without trial member of Texas Relief Commission theretofore appointed by him, member of relief commission having become "state officer" for term to end August 26, 1935. Dorenfield v. State ex rel. Allred (1934) 122 T. 467, 73 S.W.2d 83.

Action of Speaker of House of Representatives in attempting to remove member of Relief Commission theretofore appointed by him, by communication to secretary of state stating removal of such member for cause, was ineffectual to remove him, trial being indispensable part of constitutional mode for his removal as officer of state. Id.

Members of the Public Welfare Board (now the Board of Human Resources) were not required to make bond. Op.Atty.Gen. 1944, No. 0-5818.

§ 21.004. Commissioner

(a) The Commissioner of Human Resources is the executive and administrative officer of the department. The commissioner exercises all rights, powers, and duties imposed or conferred by law on the department unless the right, power, or duty is specifically delegated by the board to the department's agents or employees.

(b) The commissioner is appointed by the board with the advice and consent of two-thirds of the membership of the senate and serves at the pleasure of the board.

(c) To be eligible for appointment as commissioner, a person must be at least 35 years old, have been a resident citizen of Texas for at least 10 years prior to the appointment, have had experience as an executive or administrator, and not have served as an elected state officer during the six-month period preceding the appointment.

Historical Note

Prior Law:

Acts 1939, 46th Leg., p. 544.
Acts 1941, 47th Leg., p. 914, ch. 582, § 1.
Acts 1967, 55th Leg., p. 237, ch. 114, § 1.
Acts 1977, 65th Leg., p. 1371, ch. 543, § 1.
Vernon's Ann.Civ.St. art. 695c, §§ 2(1)a, 3(1), (2).

Library References

Social Security and Public Welfare ⇐⇒1.
States ⇐⇒45.

C.J.S. Social Security and Public Welfare §§ 6, 7.
C.J.S. States §§ 61, 80, 84, 102.

Notes of Decisions

In general 1
Powers 2

1. In general

Former Vernon's Ann.Civ.St. art. 695c was not rendered meaningless on ground that the state department consisted of state board, the executive director and all the agents and representatives of the department, since all duties of the department, unless otherwise provided, were delegated to the executive director to whom the appeal should be made. Twiss v. Doyle (Civ.App.1944) 179 S.W.2d 879.

2. Powers

The executive directors of the Department of Public Welfare (now the Department of Human Resources) and the Unemployment Compensation Commission had no authority to establish a joint merit system council. Op.Atty.Gen.1939, No. 0-1752.

The executive director of the State Department of Public Welfare (now the Department of Human Resources) had the legal right and authority to transfer funds out of the revolving fund in one district to the revolving fund in another district under the provisions of § 7-A of former Vernon's Ann.Civ.St. art. 695c (see, now, §§ 33.002 to 33.010). Op.Atty.Gen.1957, No. WW-129.

§ 21.005. Divisions of Department; Personnel

(a) The commissioner may establish divisions within the department that he considers necessary for effective administration and the discharge of the department's functions.

(b) The commissioner may allocate and reallocate functions among the divisions.

(c) The commissioner may employ personnel necessary for the administration of the department's duties.

Historical Note

Prior Law:

Acts 1939, 46th Leg., p. 344.
Acts 1941, 47th Leg., p. 914, ch. 582, § 1.
Acts 1949, 51st Leg., p. 2532, ch. 845, § 2.
Vernon's Ann.Civ.St. art. 695c, § 5.

Library References

Social Security and Public Welfare ⇐⇒1.
States ⇐⇒45.

C.J.S. Social Security and Public Welfare §§ 6, 7.
C.J.S. States §§ 79, 80, 82, 134.

Notes of Decisions

1. Employees

Travel expenses of employees of the Department of Public Welfare (now the Department of Human Resources) while working in orientation training units on temporary assignments may be reimbursed under the provisions of the general appropriations bill. Op.Atty.Gen.1954, No. S-21.

There was no legal impediment or barrier preventing the Department of Public Welfare (now the Department of Human Resources) from paying aid to families with dependent children to an employee of the department, or any other state agency, if such recipient meets the eligibility requirements for such aid. Op.Atty.Gen.1948, No. M-274.

The Department of Human Resources may not prohibit all employees from being licensed as real estate brokers or agents, where no conflict of interest is involved and the employee's performance is in no way impaired. Op.Atty.Gen.1973, No. H-1317.

§ 21.006. Local Administration

(a) The department shall establish a system of local administration and employ personnel necessary to carry out the purposes of this title in an economical manner.

(b) The commissioner may provide for the appointment of local boards to advise the local administrative units. The commissioner shall determine the size of the boards and the qualifications of the members. The functions of the boards may not conflict with or duplicate the functions of other boards authorized by law to advise the department.

Historical Note

Prior Law:

Acts 1939, 46th Leg., p. 844.
Acts 1941, 47th Leg., p. 914, ch. 662, § 1.
Acts 1951, 52nd Leg., p. 696, ch. 342, § 1.
Acts 1963, 58th Leg., p. 700, ch. 287, § 1.
Acts 1969, 61st Leg., p. 2326, ch. 848, § 1.
Vernon's Ann.Civ.St. art. 695c, § 4(7).

Notes of Decisions

1. Construction and application

Sections 4, 7, 7-A and 39 of former Vernon's Ann.Civ.St. art. 695c (see, now, §§ 11.003, 22.001, 22.002, 23.001 to 23.010, and this section) authorized the State Department of Public Welfare (now the Department of Human Resources) to contract with counties for the purpose of carrying out the food stamp program authorized and required to be administered by the department, and the counties were authorized to expend county funds for the purpose of providing such facilities. Op. Atty.Gen.1971, No. M-811.

§ 21.007. Merit System

The department may establish a merit system for its employees. The merit system may be maintained in conjunction with other state agencies that are required by federal law to operate under a merit system.

Revisor's Note

The source law section also contains the following provisions relating to the merit system which are omitted from the revised law:

> The Social Security Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods.
>
> It is further provided that if any Merit Council is set up under authority of this Act the members and the executive head thereof shall be appointed subject to the confirmation of two thirds of the Senate.
>
> (11) The Council shall provide for a preference in every State Department in this State (under which the Council has supervision) to all honorably discharged sol-

Constitutional Provisions

Article 3, § 51a, gives the legislature power, by general laws, to provide for the payment of assistance to needy dependent children under the conditions and restrictions therein prescribed, and to accept from the federal government financial aid for the assistance of such needy children.

Law Review Commentaries

Clouded issue in public welfare: Right v. privilege. Judith Harris Brown, 4 St. Mary's L.J. 299 (1973).

United States Code Annotated

Grants to states, child welfare services, see 42 U.S.C.A. § 620 et seq.

SUBCHAPTER A. GENERAL WELFARE SERVICES

Section 41.001. Duties of Department

(a) The department shall promote the enforcement of all laws for the protection of illegitimate, dependent, neglected, and delinquent children, and shall take the initiative in all matters involving the interests of these children where adequate provision for them has not already been made.

(b) The department shall give special attention to the dissemination of information through bulletins and visits, where practical, to all agencies operating under a provision of law affecting the welfare of these children.

(c) Through the county child welfare boards, the department shall work in conjunction with the commissioners courts, juvenile boards, and all other officers and agencies involved in the protection of these children. The department may use and allot funds for the establishment and maintenance of homes, schools, and institutions for the care, protection, education, and training of these children in conjunction with a juvenile board, a county or city board, or any other agency. However, the funds must be specifically appropriated by the legislature for this purpose.

(d) The department shall visit and study the conditions in state-supported eleemosynary institutions for these children and shall make recommendations for the management and operation of the institutions which will ensure that the children receive the best possible training in contemplation of their earliest discharge from the institutions.

(e) The department may not spend state funds to accomplish the purposes of this chapter unless the funds have been specifically appropriated for those purposes.

No. 86-25393

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT OF
LEE ANNE STEM and STEPHEN C. STEM	§	HARRIS COUNTY, T E X A S
AND IN THE INTEREST OF SARAH ELIZABETH STEM and STEPHEN CHARLES STEM, JR. MINOR CHILDREN	§	247TH JUDICIAL DISTRICT

COURT ORDERED TEMPORARY ORDERS

On September 9, 1986 and on January 16, 1987 the Court considered the application of the Petitioner for temporary relief. The Petitioner, appeared in person and by attorney and announced ready for trial on both occasions. Respondent appeared in person and by attorney and announced ready for trial on both occasions. The Guardian ad litem for the children also appeared on both occasions and announced ready for trial.

The Court after considering the pleadings on file and all the evidence enters the following temporary orders:

IT IS ORDERED AND DECREED that LEE ANNE STEM is hereby appointed the Temporary Managing Conservator of both of the children of the marriage , SARAH ELIZABETH STEM and STEPHEN CHARLES STEM, JR. pending the final resolution of this divorce action.

IT IS ORDERED AND DECREED that the Temporary Managing Conservator shall have all the powers, privileges and duties of a parent, to the exclusion of the other parent, subject to the rights, privileges and duties granted to any Temporary Possessory Conservator named in this Order.

E

IT IS ORDERED, ADJUDGED AND DECREED that STEPHEN C. STEM is hereby appointed Temporary Possessory Conservator of both of the children, SARAH ELIZABETH STEM AND STEPHEN CHARLES STEM, JR., until final resolution of this divorce action.

IT IS ORDERED that the Temporary Possessory Conservator shall have all the rights, privileges and duties of the Temporary Possessory Conservator as set forth in the Texas Family Code.

IT IS FURTHER ORDERED AND DECREED by the Court that the Temporary Possessory Conservator shall have access to the children as follows:

1. On the first, third and fifth Saturday of each month from 10:00 a.m. until 5:00 p.m. on the Sunday following each such first, third and fifth Saturday.

2. At such other times as may be agreed upon between the parties.

IT IS ORDERED that the Temporary Possessory Conservator shall return both the children, on time, to the Temporary Managing Conservator at her place of residence, immediately following each period of access or possession.

IT IS FURTHER ORDERED AND DECREED that the Temporary Managing Conservator shall surrender the children, on time, to the Temporary Possessory Conservator at her place of residence at the beginning of each period of possession.

IT IS FURTHER ORDERED that each party shall file a Sworn Inventory and Appraisement of all community and separate estate within fifty (50) days of the date of this Order.

IT IS FURTHER ORDERED AND DECREED by the Court that STEPHEN C. STEM shall pay child support to LEE ANNE STEM in the amount of EIGHT HUNDRED AND NO/100 DOLLARS ($800.00)

per month, payable to her at her place of residence each month at 3827 Redwood Falls, Houston, Texas 77082. Said child support shall be payable FOUR HUNDRED AND NO/100 ($400.00) DOLLARS due on the 1st day of each month and FOUR HUNDRED AND NO/100 ($400.00) due on the 15th day of each month with the first payment being due and payable on February 1, 1987.

IT IS FURTHER ORDERED AND DECREED by the Court that each child support payment above enumerated shall be paid by check drawn on an account with sufficient funds to pay for the check, check drawn on or before the 1st day of each month and the 15th day of each month and postmarked by the 1st day of each month and the 15th day of each month respectively.

IT IS FURTHER ORDERED AND DECREED by the Court that STEPHEN C. STEM shall pay as additional child support the sum of FOUR HUNDRED AND NO/100 ($400.00) DOLLARS PER MONTH on January 17, 1987. It is ORDERED that a check be written on an account with sufficient funds to cover the sum of $400.00 and that said check be postmarked by January 17, 1987 and mailed to Petitioner, LEE ANNE STEM at her place of residence above named.

IT IS FURTHER ORDERED AND DECREED by the Court that Respondent, STEPHEN C. STEM shall pay temporary alimony to LEE ANNE STEM in the sum of THREE HUNDRED AND NO/100 DOLLARS ($300.00) per month. Said Temporary Alimony shall be paid ONE HUNDRED FIFTY AND NO/100 ($150.00) DOLLARS on the first day of each month and ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00) on the 15th day of each month with the first payment being due and payable on February 1, 1987.

IT IS FURTHER ORDERED AND DECREED by the Court that each alimony payment above enumerated shall be paid by check drawn on an account with sufficient funds to pay for the check, the check drawn on or before the 1st day of each month and the 15th day of each month and postmarked and mailed to Petitioner's residence by the 1st day of each month and the 15th day of each month respectively.

IT IS FURTHER ORDERED AND DECREED by the Court that each party shall have temporary use and possession of the real estate which they currently occupy and the automobile that they currently possess.

IT IS FURTHER ORDERED AND DECREED by the Court that each party shall immediately be enjoined from doing any of the acts set forth in Petitioner's First Amended Original Petition for divorce filed in this cause, said provisions are incorporated by reference into these Temporary Orders. The Court finds that good cause exists for the issuance of the Temporary Injunctions and that irreparable harm or injury would occur without the granting of these Temporary Orders and that a bond should be dispensed with.

IT IS FURTHER ORDERED AND DECREED by the Court that the only exceptions to the Temporary Orders as requested would be the borrowing of or the transfer of funds from Respondent's Pay Deferral Account at Shell in compliance with the terms of this Order.

IT IS FURTHER ORDERED AND DECREED by the Court that Respondent shall pay as additional temporary alimony, the sum of SIXTY FIVE HUNDRED AND NO/100 ($6,500.00) DOLLARS to LEE

ANNE STEM out of which FIVE THOUSAND AND NO/100 ($5,000.00) shall be used to pay her attorney's fees.

IT IS ORDERED AND DECREED by the Court that the Respondent shall use whatever means in his discretion that are necessary to obtain said $6,500.00.

IT IS ORDERED that Respondent shall consider borrowing the funds from a lending institution, borrowing the funds from Respondent's pay deferral account or using any other means necessary to obtain the funds.

The Court does ORDER that this sum of $6,500.00 shall be paid to LEE ANNE STEM at her place of residence by 5:00 p.m. on February 20, 1987, said funds to be obtained from any source and whatever source is available to the Respondent.

It is further ORDERED that the remaining FIFTEEN HUNDRED AND NO/100 ($1,500.00) DOLLARS of the $6,500.00 received by Mrs. Stem shall be used in whole or in part to repair the damage to the residence in which Mrs. Stem currently resides.

IT IS FURTHER ORDERED AND DECREED by the Court that if the joinder of LEE ANNE STEM is required to withdraw funds from the Pay Deferral account that Mrs. Stem is hereby ordered to sign any necessary forms to consent to the withdrawal of the funds, within five days after requested to do so.

IT IS FURTHEM ORDERED AND DECREED by the Court that STEPHEN C. STEM shall pay on or before 5:00 p.m. on February 20, 1987 the sum of or TWENTY FIVE HUNDRED AND NO/100 ($2,500.00) DOLLARS to the Guardian ad Litem, ANNE H. RECIO. Said sum shall be paid to ANNE H. RECIO at her business address, 5009 Caroline, Houston, Texas 77004 by said date.

IT IS FURTHER ORDERED AND DECREED by the Court that Respondent shall use whatever means in his discretion that are necessary to obtain said $2,500.00. IT IS ORDERED that Respondent shall consider borrowing the funds from a lending institution, borrowing the funds from Respondent's pay deferral account or using means necessary to obtain the funds. The Court does ORDER that the sum of $2,500.00 be paid to the Guardian ad Litem and that said funds be obtained from any source and whatever source is available to the Respondent.

IT IS FURTHER ORDERED that the said Anne H. Recio shall deposit said sum in her trust account and keep a due and correct accounting and disbursement of all funds.

IT IS ORDERED that upon consent of the attorneys of record that all sums earned can be withdrawn from the trust account without the consent of the Court; the consent of the Court only being necessary in the event the respective attorneys do not agree with the accounting submitted by the Guardian ad litem.

IT IS FURTHER ORDERED AND DECREED by the Court that Respondent, STEPHEN C. STEM, as an additional part of the child support award contained in these Temporary Orders, shall maintain in force an insurance policy providing major medical and hospitalization coverage for the minor children of the parties.

The Respondent is ORDERED to furnish to Petitioner proof of coverage within fifteen (15) days following the signing of these temporary orders. Respondent is also ORDERED to furnish to Petitioner a copy of any renewals or changes of said insurance coverage within ten (10) days of receipt of the

change in coverage or other provisions of this policy. Kesponcent is ORDERED to furnish Petitioner within ten (10) days after written request from her any proof of loss forms necessary to affect and make a claim for medical and hospitalization benefits, and Respondent is ordered to complete and sign the proof of loss forms within (10) ten days after returned to him. Respondent is further ORDERED to forward the proof of loss forms within five (5) days after his receipt, completion and signing of it to the insurance company for prompt paymet. Respondent is further ORDERED to endorse any insurance proceeds checks received by him within five (5) days of his receipt and he is further ordered within five (5) days, to forward said endorsed check to the Petitioner at the location where he picks up the children for visitation or the last know address of the Petitioner. It is further ORDERED that in addition and cumulative to the above the Kespondent is designated as the constructive trustee to receive any insurance payments and forward them to the Petitioner as is above specified.

All these Temporary Orders shall remain in effect until modified or until final resolution of this divorce.

SIGNED AND ENTERED on this the ____ day of JAN 27 1987, 1987.

JUDGE PRESIDING

APPROVED AS TO FORM:

MICHAEL TOOMEY, INCORPORATED,

BY: _____
MICHAEL TOOMEY
Bar Card No. 20132001
4600 Highway 6 North, #210
Houston, Texas 77084
463-3566

I HAVE SEEN THIS ORDER PRIOR TO
~~APPROVED AS TO FORM:~~ ITS ENTRY BY THE COURT

1/22/87

JOHN K. GRUBB, Attorney
3D/International Tower, #850
1900 West Loop South at San Felipe
Houston, Texas 77027 961-5533

1/26/87

ANNE HARLAND RECIO
Guardian ad Litem
5009 Caroline
Houston, Texas 77004
TB# 16649300
520-8620

UNITED STATES DISTRICT C
SOUTHERN DISTRICT OF TE
ENTERED

JUL 31 1989

Jesse E. Clark, Clerk
By Deputy:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN STEM,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-88-2813
	§	
RALPH AHEARN, et al.,	§	
	§	
Defendants.	§	

ORDER

1. This case is restyled: Stem v. Ahearn, Card, and Harris County Children's Protective Service, an operation of the Texas Department of Human Services.

2. Harris County and the Board of Harris County Children's Protective Service are dismissed.

3. The remaining motions for summary judgment are denied without prejudice.

4. Stem takes nothing by his claim under 42 U.S.C. § 1985.

5. The State shall produce all documents and answer interrogatories by August 4, 1989.

Signed on July 26, 1989, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Appendix "C"